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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~15~~. 268

ENGELBERT HARDT, MARCUS L. W. KITCHEN, FREDERICK A. VON BERMUTH, ET AL., APPELLANTS,

vs.

SIGISMUND HEIDWEYER, NORBERT STIEGLITZ, THE NATIONAL BANK OF ILLINOIS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 17, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1428.

ENGELBERT HARDT, MARCUS L. W. KITCHEN, FREDERICK A. VON BERMUTH, ET AL., APPELLANTS,

vs.

SIGISMUND HEIDWEYER, NORBERT STIEGLITZ, THE NATIONAL BANK OF ILLINOIS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Bill of complaint	3	2
Subpœna	14	8
Marshal's return	15	8
Alias subpœna	16	9
Marshal's return	17	9
Subpœna	19	10
Marshal's return	20	11
Appearance for defendants	21	11
Order allowing Schnabel Bros. to become parties complainants	22	11
Notice of motion of Schnabel Bros. to become parties complainants	23	12
Petition of Schnabel Bros. to become parties complainants	24	13
Demurrer to bill	28	15
Order *pro confesso* as to Heidweyer & Stieglitz	31	16
Order allowing E. C. Dillingham to become party complainant	32	16
Notice of motion of E. C. Dillingham to become party complainant	33	17
Petition of E. C. Dillingham to become party complainant	34	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1890.

	Original.	Print
Order allowing Geo. F. Victor *et al.* to become parties complainants, &c.	37	19
Petition of Geo. F. Victor *et al.* to become parties complainants, &c	38	20
Stipulation extending time in which to amend bill	41	22
Amendment to bill	42	22
Demurrer to amended bill	45	24
Final decree	48	25
Appeal bond	49	26
Clerk's certificate	52	27
Assignment of errors	53	28

1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, on Monday, the fifth day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and ninety, and of our Independence the one hundred and fourteenth year.

WM. H. BRADLEY, *Clerk.*

ENGELBERT HARDT, MARCUS L. W. KITCHEN, FREDERICK A. VON BERMUTH, E. C. DILLINGHAM, AUGUST SCHNABEL, AUGUSTE PHILIPPE MONTANT, GEORGE F. VIETOR, THOMAS ACHELIS, JR., JOHN ACHELIS, and CARL VIETOR

vs.

SIGISMOND HEIDWEYER, NORBERT STIEGLITZ, National Bank of Illinois, SIGMUND FLORSHEIM, PHILIP FLORSHEIM, and SIMON FLORSHEIM.

} In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-third day of April, 1889, came the complainants, by their solicitors, and filed in the office of the clerk of the circuit court of the United States for the
2 northern district of Illinois, at Chicago, in said district, their bond for costs and bill of complaint in said entitled cause; which said bond and bill are respectively in the words and figures following, to wit:

Bond for Costs.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. May Term, A. D. 1889.

ENGELBERT HARDT *et al.*

vs.

SIGISMUND HEIDWEYER *et al.*

} In Chancery.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them we hereby agree and stipulate that execution may issue against our property for any costs taxed against plaintiffs.

Dated this 23d day of April, A. D. 1889.

TENNEY, DRIGGS & HAWLEY.

(Endorsed:) Filed Ap'l 23, A. D. 1889. Wm. H. Bradley, clerk.

1—1428

3 United States Circuit Court, Northern District of Illinois.

To the honorable the judges of said court, in chancery sitting:

Your orators, Englebert Hardt, Marcus L. W. Kitchen, and Frederick A. Von Bermuth, who are citizens of the State of New York and partners under the name of Hardt, Von Bermuth & Co., bring this bill of complaint on behalf of themselves and all other creditors of the judgment debtors hereinafter named who may come in and contribute to the expenses of this suit against Sigismund Heidweyer, Norbert Stieglitz, National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim, defendants, who are citizens of the State of Illinois and reside in said district; and hereupon your orators complain and say:

1. That on the 21st day of January, 1887, in the circuit court of Cook county, Illinois, your orators recovered judgment at law against said defendants, Sigismond Heidweyer and Norbert Stieglitz, for ten thousand six hundred and twenty-seven dollars and five cents, which judgment was so recovered upon an indebtedness contracted by said defendants prior to the 15th day of October, 1884; that execution upon said judgment against the property of said defendants was thereafter duly issued and delivered to the sheriff of said county where said defendants at the time resided, and the same was thereafter by said sheriff returned wholly unsatisfied, he certifying thereon that he could find no property whereon to levy to make any part of the amount thereof, as by the record of said judgment and the execution and return thereon will more fully appear; and said
4 judgment remains in full force and unsatisfied and the amount aforesaid, with interest, is now equitably due thereon over and above all offsets and claims.

2. That this bill is not exhibited in collusion with said defendants or any other person on or for the purpose of protecting said defendants' property from other creditors, but for the sole purpose of obtaining the relief herein prayed.

That the aforesaid return of the sheriff upon said execution was not procured by the fraud or connivance of your orators, but was made by said sheriff solely for the reason that he was unable to find property of said defendants in said county out of which, by levy and sale, he could realize any part of the amount of said writ.

3. And your orators further represent that the defendants Sigismond Heidweyer and Norbert Stieglitz from about the month of July, 1875, to October 15th, 1884, were doing business as partners under the name of Heidweyer & Stieglitz, at Chicago, as jobbers of woolens and woolen goods. As early as the first day of January, 1884, said defendants had become and were grossly insolvent, their liabilities at that time exceeding even their nominal assets, as they then well knew. By the assistance of friends, however, they were enabled to keep up the appearance of doing business until the month of October following. Early in September, 1884, said defendants ascertained and determined definitely that they must fail, make a general disposition of their property among their creditors, and go out of business.

At that time their indebtedness amounted to about the sum of two hundred and forty thousand dollars and their assets to about the value of one hundred and fifty thousand dollars, of which one hundred and twenty-five thousand dollars was the value of their
5 merchandise and twenty-five thousand dollars that of their bills receivable and open accounts. Among their creditors at that time were the defendants The National Bank of Illinois, of Chicago; Siegmund Florsheim, their brother-in-law; Augustus Florsheim, Henry Florsheim, and Philip Florsheim, also brothers-in-law; Julius Heiman, a near relative, and Herman Hahlo and Hahlo, Stieglitz & Co., confidential friends and relatives, of New York city. The amounts owing to these several parties is alleged by said defendants to have been as follows:

National Bank of Illinois	$12,000 00
Siegmund Florsheim	2,628 00
Julius Heimann	5,000 00
Julius Heimann, administrator	5,000 00
Florsheim Brothers	5,000 00
Philip Florsheim	9,000 00
Simon Florsheim	5,000 00
Herman Hahlo	2,500 00
Hahlo, Stieglitz & Co.	2,086 56

But your orators aver that the true amount due said parties respectively was much less than the sums named. In addition to said pretended indebtedness, the defendant Siegmund Florsheim is alleged to have been liable as endorser on commercial paper of said Heidweyer & Stieglitz, not then due, to the amount of twenty-two thousand nine hundred and twenty-five dollars, some of which had more than a year to run before maturity.

4. And your orators further allege that, such being the financial condition and intent of said Heidweyer & Stieglits, it became and was their duty under the policy of the assignment law of Illinois, prohibiting and avoiding preferences among the creditors of
6 insolvent debtors, to make in due form a general assignment to some person of all their property for the benefit of their creditors; but instead of doing so, and desiring to prefer the creditors, relatives, and friends hereinbefore named in respect to the amounts due to them and the liabilities they were under for them, said Heidweyer & Stieglitz, about the fore part of said month of September, 1884, employed legal counsel to devise a way of disposing of all of their property and preferring all said creditors to the exclusion of the claims of your orators and about one hundred and fifty thousand dollars of indebtedness in addition.

Accordingly, under the advice of said counsel, said Heidweyer & Stieglitz communicated to said creditors whom they so designed to prefer a full and complete knowledge of their financial condition and insolvency and their desire to prefer them, and caused and procured said creditors to place their several claims in the hands of the attorneys of said Heidweyer & Stieglitz that they might take measures to secure for such creditors the fraudulent preferences aforesaid,

and said creditors did so place their several claims in the hands of said attorneys for that purpose.

And thereupon and thereafter said Heidweyer & Steiglitz and their creditors named above and the attorneys aforesaid, acting with and for all of them, conspired, confederated, and agreed together to fraudulently evade the assignment law of Illinois and acquire and dispose of all the property of said debtors to the exclusion of all other creditors.

5. And your orators further represent that in pursuance of said scheme said defendants Sigismond Heidweyer and Norbert Stieglitz, on the 16th day of September, 1884, executed and delivered to said attorneys for said creditors judgment notes, bearing said date,
7 payable on demand, to the parties and for amounts as follows:

National Bank of Illinois	$12,000 00
Siegmund Florsheim	41,553 50
Florsheim Bros.	5,000 00
Philip Florsheim	9,000 00

Sixteen thousand dollars was afterwards endorsed as paid upon said note to Siegmund Florsheim, for what reason your orators are not informed.

6. And on the 13th day of October, 1884, in pursuance of the same scheme, said defendants, Heidweyer & Stieglitz, executed and delivered to said attorneys for said creditors other judgment notes, payable on demand, bearing said date, as follows:

Julius Heiman, two notes, each	$5,000 00
Simon Florsheim	5,000 00
H. Hahlo & Co.	2,500 00
Hahlo, Stieglitz & Co.	2,086 56

7. All of said notes hereinbefore mentioned were filled out upon uniform blanks furnished by said attorneys, and most of them were prepared by said attorneys.

8. And your orators further represent that in pursuance of said scheme said attorneys, acting for said creditors and said debtors as well, on the 15th day of October, 1884, caused judgments to be entered upon said notes in the superior court of Cook county, Illinois, in favor of the parties and for the amounts of principal and interest and attorneys' fees, as follows:

National Bank of Illinois, principal and interest	$12,074 00
Attorneys' fees	600 00
Siegmund Florsheim, principal and interest	25,794 05
Attorneys' fees	1,289 70
8 Julius Heimann, principal	5,000 00
Attorneys' fees	250 00
Augustus Florsheim, Henry Florsheim, and Philip Florsheim, principal and interest	5,031 00
Attorneys' fees	250 00
Julius Heimann, No. 2, principal	5,000 00
Attorneys' fees	250 00

Philip Florsheim, principal and interest	$9,000 00
Attorneys' fees	450 00
Simon Florsheim, principal	5,000 00
Attorneys' fees	250 00
Herman Hahlo, principal	2,500 00
Attorneys' fees	125 00
Herman Hahlo, Edward Stieglitz, Ernst Werner, principal	2,086 56
Julius Ballin and Elias Joseph, attorneys' fees	104 34

9. The attorneys' fees in said judgments were authorized to be confessed by the terms of said judgment notes, and amounted in all to thirty-five hundred sixty-four $\frac{4}{100}$ dollars.

10. And your orators further represent that immediately after the entry of said judgments and as part of the same scheme said conspirators caused executions to be issued thereon and delivered to the sheriff of Cook county and caused him to levy upon the stock of merchandise of said Heidweyer & Stieglitz, at their store in Chicago, being all the tangible property of which they were possessed, and of the value of one hundred and twenty-five thousand dollars. Of this merchandise, about eight thousand five hundred dollars in value was replevied from the sheriff before sale, and the
9 remainder was by said sheriff soon thereafter sold at a great sacrifice of value, producing the sum of sixty-five thousand five hundred thirty-seven $\frac{37}{100}$ dollars. This amount, after payment of sheriff's fees, was applied and paid upon said executions as follows:

National Bank of Illinois, in full	$12,674 00
Siegmund Florsheim	25,250 12
Julius Heimann	4,695 92
Julius Heimann, No. 2	4,695 92
Philip Florsheim	8,454 45
Simon Florsheim	4,695 02

Leaving still apparently due and unpaid on said executions, beside interest, amounts as follows:

Siegmund Florsheim	$1,833 63
Julius Heimann	454 08
Augustus Florsheim *et al.*	558 18
Julius Heimann, No. 2	454 08
Philip Florsheim	995 55
Simon Florsheim	454 08
Herman Hahlo	2,625 90
Herman Hahlo *et al.*	2,190 00
Total deficiency	$9,565 50

10 11. And your orators further represent that the only property of value possessed by said Heidweyer & Stieglitz on said 15th day of October, 1884, other than the stock of merchandise aforesaid, were certain bills receivable of the value of about eigh-

teen thousand dollars, and certain accounts receivable of about the value of six thousand dollars; and your orators aver that as a part of the same scheme of preference said Heidweyer & Stieglitz assigned and delivered said bills and accounts receivable to the defendant Simon Florsheim in trust to collect the same for the benefit of said judgment creditors as to the amounts remaining unpaid on their aforesaid judgments and for the benefit of himself as to a claim of thirteen hundred dollars due to him by said Norbert Stieglitz individually, the surplus, if any, to be returned to said Heidweyer & Stieglitz; so that out of said accounts and bills receivable so assigned and out of said replevied goods subsequently surrendered or paid for said defendants' judgment creditors as aforesaid have received the amounts of their judgments and interest and said attorneys' fees in full. Said defendant, Simon Florsheim, has received payment in full of his claim against the defendant Norbert Stieglitz, as aforesaid, and the entire scheme originally devised by and between said Heidweyer & Stieglitz and said judgment creditors has been successfully accomplished and all the property of said defendants, Heidweyer & Stieglitz, has been appropriated to prefer said creditors to the exclusion of all others.

12. And your orators further represent and charge that the several judgment notes, judgments entered thereon, executions issued, levies and sales thereunder, transfers, assignments, and other dispositions of all their property made by the defendants Heidweyer & Stieglitz, on and subsequent to the 16th day of September,
11 1884, are in effect but one instrument and one transaction and, taken together, constitute a general assignment for the benefit of creditors, in which said several preferred creditors are chargeable as assignees and trustees of the property which, by means of said transactions, came to their hands and control.

13. And your orators further charge that the transactions aforesaid were all entered into and consummated in pursuance of a conspiracy between the parties thereto to defraud the other creditors of said Heidweyer & Stieglitz and in fraud of the laws of Illinois, and that said parties are jointly and severally liable to account for all of said property at its true value when they receive it, and not at the amount for which it was sold, and are not entitled to share in any manner in the distribution of the fund so produced until after all the non-offending creditors have been fully paid.

14. And your orators further represent that while it is true that all the transactions aforesaid constitute an assignment for the benefit of creditors, yet said assignment is fraudulent and void as to creditors, in this: that said judgment notes were purposely given for sums greater than was due the payees thereof respectively at the time they were so given; that the sum provided in said judgment notes for attorneys' fees, being thirty-five hundred and sixty-four $\frac{4}{100}$ dollars, and which was included in said judgments confessed and thereafter collected thereon, was so inserted in said instruments with actual intent to hinder, delay, and defraud the creditors of said Heidweyer & Stieglitz, and actually has defrauded them, whereby said notes, judgments, and everything that was done under them

became wholly fraudulent and void as to the creditors of said Heidweyer & Stieglitz, and in that all of said transactions constituting such assignment were conceived and executed from beginning to end with the sole and only purpose of defrauding the law and defrauding all the creditors not intended to be protected thereby, including your orators.

15. All which actings and doings are contrary to equity and good conscience and are only relievable in a court of equity.

To the end, therefore, that the defendants may severally answer this bill (their answers under oath being waived); that each defendant may state the true consideration for the judgment notes herein mentioned, the amount collected thereon, and the source from which collected; that the defendants Heidweyer & Stieglitz may state the amount and value of their estate on the 15th day of October, 1884, the amount of their indebtedness on that day, with a statement of the names and residences of their creditors and the amounts then due to each; that the several judgment notes, judgments confessed thereon, executions, levies, and sales thereunder, transfer of bills and accounts receivable, and all other transactions had and done by and between said Heidweyer & Stieglitz and said preferred creditors and hereinbefore referred to be adjudged to constitute a voluntary assignment for the benefit of the creditors of said Heidweyer & Stieglitz with preferences; that the preferences be declared void; that said preferred creditors be held chargeable and be charged and decreed to account jointly and severally as assignees and trustees for all the property which has come to their hands or possession or to the hands or possession of any of them by virtue of any of the transactions related herein; that said assignees and trustee be removed and a receiver appointed, to whom they shall be decreed to account for the same at its true market value and not for the amount they may have realized out of it; that the fund so to be
13 realized, if it shall appear to the court that said assignment is not altogether void, shall be distributed ratably among your orators and all the creditors of said debtors under the direction of the court, excluding from the distribution, however, and postponing the creditors guilty of the frauds aforesaid until all others are fully paid; but if it shall appear to the court, by reason of the frauds alleged, that said assignment is altogether fraudulent and void as to creditors, then that said fund be paid in satisfaction of the judgment or your orators and of all other creditors who may be entitled, and that the complainants may have such other and further relief as may be just.

May it please the court to grant unto your orators the writ of subpœna in chancery, commanding the appearance and answer of the defendants, Sigismond Heidweyer, Norbert Stieglitz, National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim, and that they stand to and abide such order and decree as may be agreeable to equity.

TENNEY, DRIGGS & HAWLEY,
Solicitors for Complainants.

D. K. TENNEY, *Of Counsel.*

(Endorsed:) Filed Ap'l 23, 1889. Wm. H. Bradley, clerk.

14 On the same day, to wit, on the twenty-third day of April, 1889, there issued out of said clerk's office a writ of subpœna in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to Sigismond Heidweyer, Norbert Stieglitz, National Bank of Illinois, Siegmund Florsheim, and Simon Florsheim, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of May next, to answer the bill of complaint of Engelbert Hardt, Marcus L. W. Kitchen, and Frederick A. Von Bermuth, partners, &c., as Hardt, Von Bermuth & Co., this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

[SEAL.] Witness the Hon. Melville W. Fuller, Chief Justice
15 of the Supreme Court of the United States of America, at Chicago aforesaid, this 23d day of April, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the 113th year.

WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable the complainants' bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

The within defendants not found in my district.

F. H. MARSH,
U. S. Marshal,
By GEO. N. JONES, *Deputy.*

(Endorsed:) Filed May 7, A. D. 1889. Wm. H. Bradley, clerk.

16 Afterward, to wit, on the seventh day of May, 1889, there issued out of said clerk's office an *alias* writ of subpœna in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Alias Subpœna.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to Sigismond Heidweyer, Norbert Stieglitz, National Bank of Illinois, Siegmund Florsheim, and Simon Florsheim, Greeting:

We again command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of June next, to answer the bill of complaint of —— ——, filed April 23, 1889, in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at
17 [SEAL.] Chicago aforesaid, this 7th day of May, in the year our Lord one thousand eight hundred and eighty-nine, and of our Independence the 113th year.

WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable the complainants' bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served the within writ within my district in the following manner, to wit: Upon Norbert Stieglitz, therein named, on the 14th day of May, A. D. 1889; also upon Sigmund Florsheim, therein named, on the 8th day of May, A. D. 1889; also upon Simon Florsheim, therein named, on the 8th day of May, A. D. 1889, by personally delivering to each of them a true copy of the same on the aforesaid days. I also served the same upon the following-named defendant, not having been able to find him to serve personally, by leaving a true copy for him at his usual place of abode with an adult person and a member of his family, to wit, upon Sigismond Heidweyer on the 14th day of May, A. D. 1889, with Gussie Eichin-

vath. I served the same upon the National Bank of Illinois by delivering a true copy of the same to W. A. Hammond,
18 cashier of the aforesaid bank, on the 8th day of May, A. D. 1889, the president of the National Bank of Illinois not found in my district.

F. H. MARSH,
U. S. Marshal,
By GEO. N. JONES, *Deputy.*

(Endorsed:) Circuit court United States, northern district of Illinois. Engelbert Hardt *et al. vs.* Sigismond Heidweyer *et al.* *Alias* chancery subpœna. Returnable to rule day, first Monday in June, A. D. 1889. Wm. H. Bradley, clerk. Filed May 15, A. D. 1889. Wm. H. Bradley, clerk. Tenney, Driggs & Hawley, compl'ts' sol's.

19 Afterward, to wit: on the seventeenth day of May, 1889, there issued out of said clerk's office a writ of subpœna in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to Philip Florsheim, impleaded with Sigismond Heidweyer *et al.*, Greeting:

We command you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of July next, to answer the bill of complaint of Engelbert Hardt, Marcus L. W. Kitchen, and Frederick A. von Bermuth, partners, &c., filed April 23, 1889, in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 17th day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of our
20 Independence the 113th year.

[SEAL.]

WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against him as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served the within writ within my district in the following manner, to wit, upon Philip Florsheim, therein named, on the 21st day of May, A. D. 1889, by personally delivering to him a true copy of the same on the aforesaid day.

F. H. MARSH,
U. S. Marshal,
By GEO. N. JONES, *Deputy.*

(Endorsed:) Filed May 21st, 1889. Wm. H. Bradley, clerk.

21 Afterward, to wit, on the third day of June, 1889, came Sigmond Florsheim, Phillip Florsheim, the National Bank of Illinois, and Simon Florsheim, by their solicitors, and filed in said clerk's office their appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

Appearance.

U. S. OF AMERICA,
Northern Dist. of Ill.

In the Circuit Court, of the May Term, 1889.

HARDT *et al.*
vs.
HEIDWEYER *et al.* } In Chancery.

We herewith enter the appearance of the defendants, Sigmond Florsheim, Phillip Florsheim, Simon Florsheim, and The National Bank of Illinois, in the above-entitled cause and ask for the customary time wherein to plead, answer, or demur.

FLOWER, REMY & HOLSTEIN,
Sol'rs for said Def'ts.

Dated June 3rd, 1889.

(Endorsed:) Filed June 3, 1889. Wm. H. Bradley, clerk.

22 Afterward, to wit, on the twenty-fourth day of June, in the adjourned May term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

ENGELBERT HARDT *et al.*
vs.
SIGISMOND HEIDWEYER *et al.* } In Chancery.

And now come Richard August Schnabel and Auguste Philippe Montant, copartners doing business under the firm name and style

of Schnabel Brothers, and present their petition praying leave to come in as parties complainant in the above-entitled cause upon contributing their share of the expenses thereof; and the court having read the petition and being now fully advised in the premises, upon motion of Sydney Richmond Taber, solicitor for the petitioners, due notice thereof having been given, it is ordered that the said Richard August Schnabel and August Philippe Montant be allowed to come in and that they be, and hereby are, made parties complainant in said cause, and the question of costs and contribution to the expenses of the suit is reserved.

On the same day, to wit, on the twenty-fourth day of June, 1889, came Richard August Schnable and Auguste Philippe Mon-
23 tant, by their solicitor, and filed in said clerk's office their notice and petition in said entitled cause; which said notice and petition are in the words and figures following, to wit:

Petition of Richard August Schnabel and Others to be Made Parties Complainant and Notice of Motion for Leave to File the Same.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

HARDT *et al.* }
vs } In Chancery. G. No. 21274.
HEIDWEYER *et al.* }

To Messrs. Tenney, Driggs & Hawley, solicitors for complainants Hardt, Kitchen, and Von Bermuth; Messrs. Peckham & Brown, solicitors for complainant Dillingham; Messrs. Flower, Remy & Holstein, solicitors for defendants Florsheim & National Bank of Illinois:

Please take notice that on Monday, the twenty-fourth day of June, A. D. 1889, at ten a. m., or as soon thereafter as counsel can be heard, before his honor Judge Gresham, in the United States circuit court for said district, or, if said judge is not then and there holding court, in chambers, I shall move the court for leave to file the petition, a copy of which is hereto annexed and served herewith, and to enter an order in accordance with the prayer of said petition.

SYDNEY RICHMOND TABER,
Solicitor for Petitioners Schnabel and Montant.

24 CHICAGO, *June* 22, 1889.

Copies of the foregoing notice and of the petition therein mentioned received this 22nd day of June, 1889.

FLOWER, REMY & HOLSTEIN.
TENNEY, DRIGGS & HAWLEY,
Comp'ts' Sol'rs.
PECKHAM & BROWN.

UNITED STATES OF AMERICA } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

HARDT *et al.* }
vs. } In Chancery. G. No. 21274.
HEIDWEYER *et al.* }

To the honorable judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

The petition of Richard August Schnabel, of the city of New York, in the State of New York, a citizen of the Empire of Germany, and Auguste Philippe Montant, of the said city of New York, a citizen of the Republic of France, being copartners doing business in the said city of New York under the firm name and style of Schnabel Brothers, respectfully represent that they are creditors by judgment of Sigismond Heidweyer and Norbet Stieglitz, defendants in the above-entitled cause; that their said judgment was recovered on, to wit, the sixth day of May, A. D. 1889, in the circuit
25 court of the county of Cook, in the State of Illinois, against the said defendants, Heidweyer and Stieglitz, for the sum of twenty-one thousand seven hundred and twenty dollars and four cents ($21,720.04) and costs, and is wholly unsatisfied and unpaid; that on, to wit, the eighth day of May, A. D. 1889, an execution in the usual form was duly issued on said judgment, directed to the sheriff of said Cook county, where the said defendants then resided and now reside, to be executed in due form of law; that the said execution was on, to wit, the date last aforesaid, delivered to said sheriff, and on, to wit, the twenty-first day of May, A. D. 1889, was by the said sheriff returned wholly unsatisfied, he certifying thereon that he had demanded of the said defendants money or property to satisfy said writ; that they failed to satisfy the same or any part thereof, and that he could find no property in his county on which to levy to make any part of the amount thereof, and that there is now due and unpaid upon said judgment the sum of $21,720.04 and the costs of said suit, together with interest from the date of the rendition thereof.

The petitioners further show that the petition is not exhibited in collusion with said defendants, Heidweyer and Stieglitz, or any other person, nor for the purpose of protecting said defendants' property from other creditors, but for the sole purpose of compelling payment of said judgment, and that the aforesaid return of the sheriff was not procured by the fraud or connivance of the petitioners, but was made by said sheriff solely for the reason that he was unable to find property of said defendants in said county out of which, by levy and sale, he could realize any part of the amount of said writ.

The petitioners further represent that the above-entitled cause was commenced on, to wit, the twenty-third day of April, A. D. 1889, on behalf of the complainants and all other creditors of the
26 judgment debtors therein named who might come in and

contribute to the expenses of said suit against the said defendants, Heidweyer and Stieglitz and National Bank of Illinois, Sigmund Florsheim, Philip Florsheim, and Simon Florsheim.

The petitioners further show that they are desirous of being made parties complainant in the above-entitled cause and are willing and hereby offer, upon being allowed to come in as such parties, to contribute their proportion to the expenses of said cause.

The petitioners allege that all the material allegations contained in the bill in said cause are true, and they hereby adopt the said allegations and make them a part of this petition.

Wherefore the petitioners pray that by an order of this court they may be allowed to come in and be made parties complainant in the above-entitled cause with the said complainants, Englebert Hardt, Marcus L. W. Kitchen, and Frederick A. Von Bermuth, upon payment to them of the petitioners' ratable share of the costs and expenses of said suit, to be ascertained by the court, and for such other and further relief as to the court may seem proper.

RICHARD AUGUST SCHNABEL,
By S. R. TABER, *His Solicitor.*
AUGUSTE PHILIPPE MONTANT,
By S. R. TABER, *His Solicitor.*

SYDNEY RICHMOND TABER,
Solicitor for said Petitioners.

27 STATE OF ILLINOIS, } ss:
County of Cook, }

Sydney Richmond Taber, being duly sworn, deposes and says that he is the agent and solicitor for the petitioners in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the same is true as he verily believes.

SYDNEY RICHMOND TABER.

Subscribed and sworn to before me this twenty-second day of June, A. D. 1889.

[SEAL.] CHAS. W. TOWNSEND,
Notary Public.

(Endorsed:) Filed June 24, 1889. Wm. H. Bradley, clerk.

Afterward, to wit, on the twenty-ninth day of June, 1889, came the National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim, by their solicitors, and filed in said clerk's office their demurrer to the bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

28 *Demurrer.*

United States Circuit Court, Northern District of Illinois.

ENGLEBERT HARDT, MARCUS L. W. KITCHEN, and FREDERICK A. VON BERMUTH
vs.
SIGISMOND HEIDWEYER, NORBERT STIEGLITZ, NATIONAL BANK OF ILLINOIS, SIEGMUND FLORSHEIM, PHILIP FLORSHEIM, and SIMON FLORSHEIM.

The demurrer of The National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim, four of the defendants above named, to the bill of complaint of said complainants.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto and for cause of demurrer show—

That the said complainants have not by their said bill made such a case as entitles them in a court of equity to any relief from or against these defendants touching the matters contained in the said bill or any of said matters.

And for further cause of demurrer these defendants say that it appears upon the face of said bill that the said complainants, by reason of the lapse of time and their great delay in seeking
29 to enforce said causes of action in said bill set forth, have been guilty of such inexcusable laches as to bar and preclude them in a court of equity from all right to any recovery or relief from or against these defendants touching the matters contained in said bill or any of such matters.

And for a further cause of demurrer these defendants say that it appears upon the face of said bill that this court has no jurisdiction of the subject-matter thereof.

And for a further cause of demurrer these defendants further say that it appears upon the face of said bill that Herman Hahlo and the firm of Hahlo, Stieglitz & Company, composed of Herman Hahlo, Edward Stieglitz, Ernst Werner, Julius Ballin, and Elias Joseph, are necessary and proper parties to this suit.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants demur to the said bill and to all matters and things therein contained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

FLOWER, REMY & HOLSTEIN,
Solicitors for said Defendants.

I certify that in my opinion the foregoing demurrer of The National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim, four of the defendants to the bill of complaint of said complainants, is well founded in law and proper to be filed in the above cause.

30 J. M. FLOWER,
Counsel for said Defendants.

STATE OF ILLINOIS, }
County of Cook, } ss:

Siegmund Florsheim, being duly sworn, deposes and says that he is one of the defendants named in the foregoing demurrer, and makes this affidavit in behalf of himself and his codefendants; that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

SIEGMUND FLORSHEIM.

Subscribed and sworn to before me this 29th day of June, A. D. 1889.

[SEAL.] ABRAHAM L. CLOUD,
Notary Public.

(Endorsed:) Filed June 29, 1889. Wm. H. Bradley, clerk.

31 Afterward, to wit, on the eighth day of July, in the July term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ENGELBERT HARDT *et al.*
vs. } In Chancery.
SIGISMOND HEIDWEYER *et al.*

It appearing that the defendants Sigismond Heidweyer and Norbert Stieglitz have not appeared herein, and being now three times called in open court to appear and plead, answer or demur, to the complainants' bill, come not, but make default, thereupon it is ordered that their defaults be entered, and that said bill be taken as confessed and true as against them.

32 Afterward, to wit, on the fifteenth day of July, in the July term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

ENGELBERT HARDT *et al.*
vs. } In Chancery.
SIGISMOND HEIDWEYER *et al.*

On reading the petition of E. C. Dillingham and the consent of the

original complainants herein, and of the complainants Schnabel and Montant, and of the defendants Florsheim and The National Bank of Illinois, by their respective solicitors, and, on motion of counsel for said petitioner, it is ordered that the said E. C. Dillingham have leave to file his said petition, and that he be made a party complainant herein, as prayed in the said petition.

On the same day, to wit, on the fifteenth day of July, 1889, came E. C. Dillingham, by his solicitors, and filed in said clerk's office his notice and petition in said entitled cause; which said notice and petition are in the words and figures following, to wit:

33 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division. In Equity.

ENGLEBERT HARDT *et al.*
vs.
SIGISMOND HEIDWEYER *et al.*
} Gen. No. 21274. Term No. 892.

To Messrs. Tenney, Driggs & Hawley, solicitors for complainants Hardt *et al.*; Sydney Richmond Taber, solicitor for complainants Schnabel and Montant; Flower, Remy & Holstein, solicitors for defendants Florsheim and National Bank of Illinois:

Please to take notice that on the first day of July, A. D. 1889, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, before the Honorable Henry W. Blodgett, one of the judges of this court, or, in case he shall not hear motions on that day, then before such other judge of this court as will hear us, we shall move for leave to file the petition hereto annexed and for an order in accordance with the prayer of said petition.

Chicago, June 27, 1889.

PECKHAM & BROWN,
Solicitors for E. C. Dillingham, Petitioner.

Service of the foregoing notice and copy of said petition is hereby acknowledged, and we consent to the filing of said petition and the entering of an order in accordance with the prayer thereof.

Chicago, June 28, 1889.

TENNEY, DRIGGS & HAWLEY,
Comp'ts' Sol'rs.

34 SYDNEY RICHMOND TABER,
Solicitor for Schnabel & Montant.

FLOWER, REMY & HOLSTEIN.

United States Circuit Court for the Northern District of Illinois, Northern Division. In Equity.

HARDT *et al.* *vs.* HEIDWEYER *et al.* } Gen. No. 21274. Term No. 892.

The Petition of E. C. Dillingham to be Made a Party Complainant.

To the honorable the judges of the United States circuit court for the northern district of Illinois, in chancery sitting:

And now comes your petitioner, E. C. Dillingham, a citizen of the State of New York, and respectfully petitions this court that he may be made a party complainant in the cause of Hardt *et al. vs.* Heidweyer *et al.*, above entitled, and may have such relief as he shall prove himself entitled to upon the allegations of the bill herein and this petition, and offers to contribute to the expenses of said suit whatever may by the court be deemed proper; and alleges—

That all the allegations of the said bill of Hardt *et al. vs.* Heidweyer *et al.* in the said bill contained are true, and that he adopts the same and adds thereto the allegation that he, the said petitioner, E. C. Dillingham, upon the sixteenth day of November, A. D. 1885, in the superior court of Cook county, Illinois, recovered a judgment at law against the said defendants, Sigismond Heidweyer and Norbert Stieglitz, for $9,132.26, which judgment was so recovered upon on an indebtedness contracted prior to the fifteenth day of October, A. D. 1884; that execution upon said judgment against the property of said defendants was thereafter duly issued and delivered to the sheriff of said county, where said defendants at the time resided, and the same was thereafter returned by the said sheriff wholly unsatisfied, he certifying thereon that he could find no property whatever to levy upon to make any part thereof, as by the record of said judgment and the execution and return thereon will more fully appear, and said judgment remains in full force and unsatisfied to the amount aforesaid; that interest is now equitably due thereon over and above all offsets and claims.

And, also, the allegation that this petition or bill is not exhibited in collusion with said defendants or any other person or for the purpose of protecting said defendants' property from other creditors, but for the sole purpose of obtaining the relief herein and in the said bill of Hardt *et al. vs.* Heidweyer *et al.* prayed; that the aforesaid return of the sheriff upon said execution was not procured by the effort or connivance of your orator, but was made by the said sheriff solely for the reason that he was unable to find property of said defendants in said county out of which, by levy and sale, he could realize any part of the amount of said writ.

And your petitioner will ever pray.

E. C. DILLINGHAM,
By PECKHAM & BROWN,
His Solicitors.

THOMAS H. PEASE, *Of Counsel.*

STATE OF ILLINOIS, } ss:
Cook County, }

Thomas H. Pease, being duly sworn, deposes and says that he is one of the solicitors for the petitioner, E. C. Dillingham, in
36 the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true, as he verily believes.

THOMAS H. PEASE.

Subscribed and sworn to before me this twenty-eighth day of June, A. D. 1889.

[SEAL.] FREDERICK P. READ,
Notary Public.

(Endorsed:) Filed July 15, 1889. Wm. H. Bradley, clerk.

37 Afterward, to wit, on the sixteenth day of December, in the December term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

ENGELBERT HARDT *et al.*
vs. } In Chancery.
SIGISMOND HEIDWEYER *et al.*

And now come the intervening petitioners, George F. Vietor, Thomas Achelis, Jr., John Achelis, and Carl Vietor, and present their petition to be allowed to be made parties complainant in the above-entitled cause on contributing their proportion of the costs and expenses incurred in the prosecution of the above-entitled cause; and the court having read the petition and being fully advised in the premises, on motion of said petitioners, it is hereby ordered, adjudged, and decreed that the said petitioners be and are hereby allowed to become parties complainant in the above-entitled cause. The complainants confess defendants' demurrer, and leave is given them to amend their bill in ten days.

On the same day, to wit, on the 16th day of December, 1889, came George F. Vietor, Thomas Achelis, Jr., John Achelis, and Carl Vietor, by their solicitor, and filed in said clerk's office their petition in said entitled cause; which said petition is in the words and figures following, to wit:

38 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois. }

In the Circuit Court of the United States for the Northern District of Illinois.

HARDT *et al.* }
vs. } In Chancery. Gen. 21274.
——.——. }

To the honorable judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting.

The petition of George F. Victor, Thomas Achelis, Jr., John Achelis, and Carl Victor, of the city of New York, in the State of New York, citizens of the said State of New York, being copartners doing business in the said city of New York under the firm name and style of Fred'k Victor & Achelis, respectfully represent that they are creditors by judgment of Sigismond Heidweyer and Norbert Stieglitz, defendants in the above-entitled cause; that their said judgment was recovered on, to wit, the 11th day of November, A. D. 1889, in the circuit court of the United States for the northern district of Illinois, against the said defendants, Heidweyer and Stieglitz, for the sum of six thousand seven hundred and four dollars ($6,704.00), and is wholly unsatisfied and unpaid; that on, to wit, the 5th day of December, A. D. 1889, an execution in the usual form was duly issued on said judgment, directed to the marshal for said district, where the said defendants then resided and now reside, to be executed in due form of law, and that the said execution was on, to wit, the date last aforesaid, delivered to said marshal, and on, to wit, the sixth day of December, A. D. 1889, was by the
39 said marshal returned wholly unsatisfied, and that there is now due and unpaid upon said judgment the sum of $6,704.00 and the costs of said suit, together with interest from the date of the rendition thereof.

The petitioners further show that this petition is not exhibited in collusion with said defendants, Heidweyer and Stieglitz, or any other person, nor for the purpose of protecting said defendants' property from other creditors, but for the sole purpose of compelling payment of said judgment, and that the aforesaid return of the marshal was not procured by the fraud or connivance of the petitioners, but was made by said marshal solely for the reason that he was unable to find property of said defendants in said district out of which by levy and sale he could realize any part of the amount of said writ.

The petitioners further represent that the above-entitled cause was commenced on, to wit, the twenty-third day of April, A. D. 1889, on behalf of the complainants and all other creditors of the judgment debtors therein named who might come in and contribute to the expenses of said suit against the said defendants, Heidweyer and Stieglitz and National Bank of Illinois, Sigmund Florsheim, Philip Florsheim, and Simon Florsheim.

The petitioners further show that they are desirous of being made

parties complainant in the above-entitled cause and are willing and hereby offer, upon being allowed to come in as such parties, to contribute their proportion to the expenses of said cause.

The petitioners allege that all the material allegations contained in the bill in said cause are true, and they hereby adopt the said allegations and make them a part of this petition.

Wherefore the petitioners pray that by an order of this court they may be allowed to come in and be made parties complainant in the above-entitled cause with the said complainants
40 Englebert Hardt, Marcus L. W. Kitchen, Frederick A. Von Bermuth, upon payment to them of the petitioners' ratable share of the costs and expenses of said suit, to be ascertained by the court, and for such other and further relief as to the court may seem proper.

GEORGE F. VIETOR,
By GEO. R. GRANT,
His Solicitor.
THOMAS ACHELIS, JR.,
By GEO. R. GRANT,
His Solicitor.
JOHN ACHELIS,
By GEO. R. GRANT,
His Solicitor.
CARL VIETOR,
By GEO. R. GRANT,
His Solicitor.

GEO. R. GRANT,
Solicitor for said Petitioner.

STATE OF ILLINOIS, }
County of Cook. } *ss:*

George R. Grant, being duly sworn, deposes and says that he is the agent and solicitor for the petitioners in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the same is true as he verily believes.

GEO. R. GRANT.

Subscribed and sworn to before me this 16th day of December, A. D. 1889.

GEO. W. KEMP,
U. S. Com., N. D. Ills.

(Endorsed:) Filed Dec. 16, 1889. Wm. H. Bradley, clerk.

41 Afterward, to wit, on the fifteenth day of January, 1890, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

Circuit Court of the United States, Northern District of Illinois.

ENGELBERT HARDT *et al.*
vs.
SIGISMOND HEIDWEYER *et al.*

The time for the complainants to amend their bill herein is hereby extended thirty days.

C. H. REMY,
Sol'r for Def'ts.

(Endorsed:) Filed Jan'y 15, 1890. Wm. H. Bradley, clerk.

On the same day, to wit, on the fifteenth day of January, 1890, came the complainants, by their solicitors, and filed in said clerk's office their amendment to the bill in said entitled cause; which said amendment is in the words and figures following, to wit:

42 United States Circuit Court, Northern District of Illinois.

ENGELBERT HARDT *et al.*
vs.
SIGISMUND HEIDWEYER *et al.* } In Chancery.

And now come the complainants and, by leave of the court first had and obtained, amend the bill of complaint and the several petitions filed herein by adding the following averments:

And your orators further represent that at the time of the several transactions hereinbefore mentioned they were and ever since have been residents of the city of New York, and that the judgment creditors aforesaid, who were defendants to this bill, were and now are residents of the city of Chicago; that immediately after the entry of the judgments aforesaid your orators caused an investigation to be made as to the genuineness of the indebtedness represented by said judgments and the good faith of the judgment creditors in having them entered and enforced in the manner set forth herein; that it was upon such investigation given out, represented, and stated to your orators by each of said judgment creditors, defendants herein, that their said judgments were for full value and were entered aggressively by them for the sole purpose of realizing the moneys due them respectively, and that they did so without the knowledge, privity, or procurement of the debtors themselves, and said debtors then stated that they had still a large amount of property remaining in their hands in the form of book accounts and bills receivable, applicable to the payment of their other debts, and that they
43 proposed to convert the same and apply the proceeds thereof to such payment as soon as possible.

Relying upon which statements and believing the same to be true, your orators refrained for a considerable time to take legal

measures to collect the large indebtedness due them in the belief also that the transactions as to said judgments were *bona fide* and having no knowledge or information of any fact tending to show that they constituted, constructively, an assignment for the equal benefit of all creditors.

A long time afterwards and within, to wit, less than one month from the time of bringing this suit, your orators for the first time learned not only that said judgments covered and took all the tangible property of said Heidweyer & Stieglitz, but that the entry thereof was procured by them for the express purpose of preferring said judgment creditors, and that at the same time they transferred all their remaining property to a trustee for the benefit of creditors, as heretofore in this bill alleged, thereby creating an assignment, as herein alleged.

Your orators, Engelbert Hardt, Marcus L. W. Kitchen, Frederick A. Von Bermuth, and E. C. Dillingham, had in the meantime diligently pursued their ordinary remedies in the law for the recovery of the amount due them by bringing suit against said Heidweyer & Stieglitz, recovering judgment, and issuing execution, which was ineffectual, as in the original bill stated; and your orators, Richard August Schnabel, Auguste Phillippe Montant, George F. Vietor, Thomas Achelis, Jr., John Achelis, and John Vietor, on learning the above-mentioned facts respecting the purpose in procuring the said judgments by confession and the said assignment and preferences, at once proceeded to reduce their several claims against
44 said Heidweyer and Stieglitz to judgment in order to lay the foundation for the present chancery proceeding by instituting suits against said debtors, recovering judgments therein and issuing execution; all of which was ineffectual, as in said petitions set forth.

Wherefore your orators say and insist that they have been guilty of no laches in the premises which should deprive them of an adequate remedy as herein prayed, but have, on the contrary, exercised such due diligence as reasonable and prudent men could be expected to under the circumstances; and your orators further say that upon the facts alleged in this bill they claim also that the entry of said judgments and transfer of other property were fraudulent, made to hinder and delay your orators and the other creditors in the collection of their claims, and that no such claim could be asserted in equity until judgment entered, execution issued and returned unsatisfied as aforesaid.

TENNEY, HAWLEY & COFFEEN,
Solicitors and of Counsel for Hardt, Von Bermuth & Co.
PECKHAM & BROWN,
Solicitors & of Counsel for E. C. Dillingham.
GEO. R. GRANT,
Sol'r & of Counsel for Geo. F. Vietor et al.
SIDNEY RICHMOND TABER,
Of Counsel & Sol'r for Comp'ts Schnabel & Montant.

(Endorsed:) Filed Jan'y 15, 1890. Wm. H. Bradley, clerk.

45 Afterward, to wit, on the fourteenth day of February, 1890, came The National Bank of Illinois, Siegmund Florsheim, Phillip Florsheim, and Simon Florsheim, by their solicitors, and filed in said clerk's office their demurrer to the amended bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

United States Circuit Court, Northern District of Illinois.

ENGLEBERT HARDT, MARCUS L. W. KEYCHEN, and FREDERICK A. VON BERMUTH
vs.
SIGISMOND HEIDWEYER, NORBERT STIEGLITZ, NATIONAL BANK OF Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim.

The demurrer of The National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim, four of the defendants above-named, to the amended bill of complaint of said complainants.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainants have not by their said amended bill of complaint made such a case as entitles them in a court of equity to any relief from or against these defendants touching the matters contained in the said amended bill or any of said matters; and for further cause of demurrer these defendants say that it appears upon the face of said amended
46 bill that the said complainants, by reason of the lapse of time and their great delay in seeking to enforce said causes of action in said amended bill set forth, have been guilty of such inexcusable laches as to bar and preclude them in a court of equity from all right to any recovery or relief from or against these defendants touching the matters contained in said amended bill or any of such matters.

And for a further cause of demurrer these defendants say that it appears upon the face of said amended bill that this court has no jurisdiction of the subject-matter thereof.

And for further cause of demurrer these defendants further say that it appears upon the face of said amended bill that Herman Hahlo and the firm of Hahlo, Stieglitz & Company, composed of Herman Hahlo, Edward Steiglitz, Ernst Werner, Julius Ballin, and Elias Jóseph, are necessary and proper parties to this suit.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill of complaint, these defendants demur to the said amended bill and to all matters and things therein con-

tained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said amended bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

C. H. REMY,
Solicitors for said Defendants.

I certify that in my opinion the foregoing demurrer of The National Bank of Illinois, Siegmund Florsheim, Phillip Florsheim, and Simon Florsheim, four of the defendants, to the amended bill of complaint of said complainants, is well founded in law and proper to be filed in the above cause.

47 C. H. REMY,
Counsel for said Defendants.

STATE OF ILLINOIS, } ss:
County of Cook, }

Siegmund Florsheim, being duly sworn, deposes and says that he is one of the defendants named in the foregoing demurrer, and makes this affidavit in behalf of himself and his codefendants; that he has read the foregoing demurrer to the amended bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

SIEGMUND FLORSHEIM.

Subscribed and sworn to before me this 13th day of Feb'y, A. D. 1889.

[SEAL.] FRED. L. BROOKS,
Notary Public.

(Endorsed:) Filed Feb'y 14, 1890. Wm. H. Bradley, clerk.

48 Afterward, to wit, on the fifth day of May, in the adjourned May term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

ENGELBERT HARDT, MARCUS L. W. KITCHEN, FREDERICK A. VON BERMUTH, E. C. DILLINGHAM, AUGUST SCHNABEL, AUGUSTE PHILIPPE MONTANT, GEORGE F. VICTOR, THOMAS ACHELIS, JR., JOHN ACHELIS, AND CARL VICTOR
vs.
SIGISMOND HEIDWEYER *et al.* } In Chancery.

Now come the parties, by their solicitors, and now comes on to be

heard the demurrer of The National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim, filed herein on the fourteenth day of February last, and, after hearing the arguments of counsel, the court sustains said demurrer; and thereupon it is ordered that the bill herein be dismissed at complainants' costs, and that execution issue therefor.

And now come said complainants, by their solicitors, and pray an appeal from this decree to the Supreme Court of the United States; which is allowed upon their filing an appeal bond herein within sixty days in the penal sum of five hundred dollars, with surety to be approved by the court.

49 Afterward, to wit, on the thirty-first day of May, 1890, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, Engelbert Hardt, Marcus L. W. Kitchen, Frederick A. Von Bermuth, E. C. Dillingham, Richard A. Schnabel, Auguste P. Montant, George F. Victor, Thomas Achelis, Jr., John Achelis, and Carl Victor, principals, and Geo. R. Grant, Edward O. Brown, Sydney Richmond Taber, and Daniel K. Tenney, sureties, are held and firmly bound unto Sigismund Heidweyer, Norbert Stieglitz, National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim in the penal sum of five hundred ($500.00) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 19th day of May, A. D. 1890.

The condition of the above obligation is such that whereas the said obligees did, on the fifth day of May, A. D. 1890, in the United States circuit court in and for the northern district of Illinois, and of the May term thereof, A. D. 1890, recover a decree dismissing an action on the chancery side of said court, in which the said
50 principal obligors were complainants and the said obligees were defendants, and also a decree for costs of the aforesaid action; from which said decrees of the said United States circuit court in and for the northern district of Illinois the said principal obligors have prayed for and obtained an appeal to the Supreme Court of the United States:

Now, therefore, if the said principal obligors shall duly prosecute their said appeal with effect and, moreover, pay the amount of the decree for costs rendered and to be rendered against them in case the decree shall be affirmed in said Supreme Court, then the above

obligations to be void; otherwise to remain in full force and virtue.

ENGELBERT HARDT, [SEAL.]
Per TENNEY, HAWLEY & COFFEEN,
His Att'ys-in-Fact.
MARCUS L. W. KITCHEN, [SEAL.]
Per TENNEY, HAWLEY & COFFEEN,
His Att'ys-in-Fact.
FREDERICK A. VON BERMUTH, [SEAL.]
Per TENNEY, HAWLEY & COFFEEN,
His Att'ys-in-Fact.
E. C. DILLINGHAM, [SEAL.]
By PECKHAM & BROWN, *His Att'ys-in-Fact.*
GEORGE F. VIETOR, [SEAL.]
P. GEO. R. GRANT, *His Att'y-in-Fact.*
THOMAS ACHELIS, JR., [SEAL.]
P. GEO. R. GRANT, *His Att'y-in-Fact.*
JOHN ACHELIS, [SEAL.]
P. GEO. R. GRANT, *His Att'y-in-Fact.*
CARL VIETOR, [SEAL.]
P. GEO. R. GRANT, *His Att'y-in-Fact.*
RICHARD A. SCHNABEL, [SEAL.]
Per AUGUSTE P. MONTANT, *His Att'y-in-Fact.*
51 AUGUSTE P. MONTANT. [SEAL.]
GEO. R. GRANT. [SEAL.]
EDWARD O. BROWN. [SEAL.]
SIDNEY RICHMOND TABER. [SEAL.]
DANIEL K. TENNEY. [SEAL.]

This bond is satisfactory and may be approved by the court.
C. H. REMY.

Approved.
H. W. BLODGETT, *Judge.*

(Endorsed:) Filed May 31, 1890. Wm. H. Bradley, clerk.

52 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Engelbert Hardt, Marcus L. W. Kitchen, Frederick A. Von Bermuth, E. C. Dillingham, August Schnabel, Auguste Philippe Montant, George F. Vietor, Thomas Achelis, Jr., John Achelis, and Carl Vietor are complainants and Sigismond Heidweyer, Norbert Stieglitz, National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim are defendants, as the same appears from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, northern division, this thirteenth day of June, 1890.

WM. H. BRADLEY, *Clerk.*

53 *Assignment of Errors.*

1. The circuit court erred in sustaining the demurrer.

2. The circuit court erred in dismissing the amended bill.

3. The circuit court erred in not granting the relief prayed for by the amended bill.

4. The circuit court erred in not setting aside the judgment notes, the judgments entered thereon, the executions issued, and the levies and sales thereunder, the transfers, assignments, and other dispositions of their property made by Heidweyer & Stieglitz in the amended bill described on the ground of fraud.

5. The circuit court erred in not decreeing that the said transactions were entered into and consummated in pursuance of a conspiracy to defraud appellants and other creditors of Heidweyer & Stieglitz who were not parties thereto.

6. The circuit court erred in not decreeing that the said transactions were fraudulent and void, in that the said judgment notes were purposely given for sums greater than those actually due the payees of said notes respectively at the times they were so given.

7. The circuit court erred in not decreeing that the said instruments and transactions were fraudulent and void, in that the provision in said notes for attorneys' fees was inserted with actual intent to hinder, delay, and defraud the creditors other than the payees of said notes.

8. The circuit court erred in not decreeing that the said instruments were executed and the said transactions entered into and consummated in fraud of the laws of the State of Illinois.

54 9. The circuit court erred in not decreeing that the instruments and transactions above mentioned constituted in effect but one instrument and one transaction.

10. The circuit court erred in not decreeing that the said instruments and transactions constituted an assignment for the benefit of creditors.

11. The circuit court erred in not decreeing that the said instruments and transactions were illegal and void under the provisions of the act of the State of Illinois concerning voluntary assignments for the benefit of creditors.

12. The circuit court erred in not decreeing that the provision made by Heidweyer & Stieglitz for the payment of certain of their creditors and the actual payments to them, as in the amended bill described, constituted preferences in said assignment.

13. The circuit court erred in not decreeing that appellees Sigmund, Philip, and Simon Florsheim and The National Bank of Illinois were chargeable as assignees or trustees of the property that

came to their hands by means of the said instruments and transactions.

14. The circuit court erred in not decreeing that appellee Simon Florsheim was chargeable as assignee or trustee of the property that came to his hands by means of the transfer to him of the accounts and bills receivable in the amended bill described.

D. K. TENNEY,
Solicitor and of Counsel for Appellants.
EDWARD O. BROWN,
Solicitor and of Counsel for Appellants
George R. Grant and Charles E. Pope.

Endorsed on cover: N. Illinois C. C. U. S. No. 1428. Engelbert Hardt, Marcus L. W. Kitchen, Frederick A. Von Bermuth, *et al.*, appellants, *vs.* Sigismund Heidweyer, Norbert Stieglitz, The National Bank of Illinois, *et al.* Filed October 17, 1890.

FILED.
JAN 2 1894
JAMES H. McKENNEY,
CLERK.

No. 1428.

IN THE

Supreme Court of the United States.

October Term, A. D. 1890.

ENGLEBERT HARDT ET AL.

vs.

SIGISMUND HEIDWEYER ET AL.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois

Brief and Argument on Behalf of Appellants.

TENNEY, CHURCH & COFFEEN,
SOLICITORS FOR APPELLANTS.

DANIEL K. TENNEY,
EDWARD O. BROWN,
OF COUNSEL.

GREEN, BAKER & CO., PRINTERS, 334 DEARBORN ST.

No. 1428.

IN THE

Supreme Court of the United States.

October Term, A. D. 1890.

ENGLEBERT HARDT ET AL.

vs.

SIGISMUND HEIDWEYER ET AL.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois

Brief and Argument on Behalf of Appellants.

STATEMENT OF THE CASE.

This is an appeal by the complainants in a suit in equity from a decree dismissing their bill upon demurrer. The suit was a judgment creditors bill to set aside fraudulent preferences and transfers made by the insolvent firm of Heidweyer & Stieglitz. The original bill was filed on April 23, 1889, by Engelbert Hardt, Marcus L. W. Kitchen, Frederick and A. Von Bermuth, citizens of the

state of New York, and partners under the firm name of Hardt, Von Bermuth & Co., against Sigismund Heidweyer and Norbert Stieglitz, who composed the firm of Heidweyer & Stieglitz—of which firm the complainants were judgment creditors—and against the National Bank of Illinois, Siegmund Florsheim, Philip Florsheim and Simon Florsheim, all of whom were citizens of the state of Illinois and residents of the Northern District thereof. On June 24, 1889, Richard August Schnabel and Auguste Philippe Mortaut, partners under the firm name of Schnabel Brothers, and citizens respectively of Germany and France, were made parties complainant upon their petition alleging in substance that they were judgment creditors of Heidweyer & Stieglitz, with execution on their judgment returned unsatisfied, and adopting the allegations and prayer of the original bill. (*Transcript, pp. 11-14.*) On July 15 and December 16, 1889, upon similar petitions, E. C. Dillingham, a citizen of New York, and George F. Vietor, Thomas Achelis, Jr., John Achelis and Carl Vietor, citizens of New York and partners under the name of Frederick Vietor & Achelis, were also made parties complainant (*Transcript, pp. 16-30*). On January 15, 1890, an amendment to the bill was filed. To the bill as amended the defendants, the National Bank of Illinois, Siegmund, Philip and Simon Florsheim, filed a joint demurrer (*Transcript, p. 24*). Heidweyer & Stieglitz were defaulted. The demurrer of the other defendants was sustained, and on May 5, 1890, the bill was dismissed. The appeal is from this decree.

The case stated by the bill as amended is as follows: The firm of Heidweyer & Stieglitz was organized in July, 1875, for the purpose of dealing in woolen goods in Chicago, and continued to carry on business there until October 15, 1884, when it failed. The firm had bought goods of the various complainants, and at the time of its

failure was indebted to them in the amounts for which they subsequently recovered judgment as follows:

Hardt, Von Bermuth & Co., January 21, 1887,	$10,627.05
Schnabel Brothers, May 6, 1889,	21,720.04
E. C. Dillingham, November 16, 1885,	9,132.26
Frederick Vietor & Achelis, November 11, 1889,	6,704.00
	$48,183.35

The judgments of Hardt, Von Bermuth & Co. and Schnabel Brothers were recovered in the Circuit Court of Cook County, Illinois, that of Dillingham in the Superior Court of that county, and that of Vietor & Achelis in the Circuit Court of the United States for the Northern District of Illinois. Executions on each of the judgments were duly issued and delivered respectively to the sheriff of Cook County and the United States Marshal, and were duly returned *nulla bona*.

As early as January 1, 1884, Heidweyer & Stieglitz had become grossly insolvent, as they then well knew. By the assistance of friends, however, they were enabled to keep up the appearances of doing business until the month of October following. Early in September, 1884, they determined definitely that they must fail, make a general disposition of their property among their creditors and go out of business. Their indebtedness then amounted to about $240,000 and their assets to about $150,000, of which $125,000 was the value of their merchandise, and $25,000 that of their bills receivable and open accounts. Among their creditors at that time were the defendants, the National Bank of Illinois of Chicago, Siegmund Florsheim, their brother-in-law, Augustus Florsheim, Henry Florsheim and Philip Florsheim, also brothers-in-law, Julius Heiman, a near relative, and Herman Hahlo, and Hahlo, Stieglitz & Co., confidential friends and relatives, of New York City. The amounts owing to these

several parties is alleged by said defendants to have been as follows:

National Bank of Illinois, - - -	$12,000.00
Siegmund Florsheim, - - -	2,628.00
Julius Heimann, - - - -	5,000.00
Julius Heimann, Administrator, - -	5,000.00
Florsheim Brothers - - - -	5,000.00
Philip Florsheim, - - - -	9,000.00
Simon Florsheim, - - - -	5,000.00
Herman Hahlo, - - - - -	2,500.00
Hahlo, Steiglitz & Co., - - -	2,086.56

The true amount due said parties was much less than the sums named. In addition the defendant, Siegmund Florsheim, is alleged by the defendants, to have been liable as indorser on unmatured commercial paper of the firm to the amount of $22,925, some of which had more than a year to run before maturity.

Under these circumstnaces it became the duty of Heidewyer & Stieglitz under the policy of the assignment law of Illinois, prohibiting and avoiding preferences mong the creditors of insolvent debtors, to make a general assignment of all their property for the benefit of their creditors; but instead of doing so, and desiring to prefer the relatives and friends above named for debts and liabilities alleged to be due them, the firm in the fore part of September, 1884, employed legal counsel to devise a way of disposing of all their property and preferring these creditors to the exclusion of the claims of complaints and others amounting to $15,000. Accordingly, under the advice of such counsel, Heidweyer & Stieglitz communicated to said creditors, whom they so designed to prefer, full knowledge of their financial condition and insolvency and their desire to prefer them, and caused and procured said creditors to place their several claims in the hands of the attorneys of the firm that they

might take measures to secure for such creditors such fraudulent preferences, and said creditors did so place their several claims in the hands of the firm's attorneys for that purpose. Thereafter Heidweyer & Stieglitz and the creditors named above, and the attorneys acting with and for all of them, conspired, and agreed together to fraudulently evade the assignment law of Illinois and acquire and dispose of all of the property of said debtors to the exclusion of all other creditors. In pursuance of this scheme Heidweyer & Stieglitz, on September 16, 1884, executed and delivered to said attorneys, for said creditors, judgment notes bearing that date, payable on demand to the parties and for amounts as follows:

National Bank of Illinois - - -	$12,000.00
Siegmund Florsheim - - - -	41,553.50
Florsheim Bros. - - - -	5,000.00
Philip Florsheim - - - -	9,000.00

A payment of $16,000 was afterwards endorsed upon the note to Siegmund Florsheim.

On October 13, 1884, in pursuance of the same scheme, Heidweyer & Stieglitz, executed and delivered to said attorney for said creditors other judgment notes of that date, payable on demand, as follows:

Julius Heiman, two notes each, - -	$5,000.00
Simon Florsheim - - - -	5,000.00
H. Hahlo & Co. - - - -	2,500.00
Hahlo, Stieglitz & Co. - - - -	2,086.56

All of these said notes above mentioned were filled out upon uniform blanks furnished by said attorneys and most of them were prepared by said attorneys.

In further pursuance of said scheme, said attorneys, acting for the creditors and debtors as well, on October 15, 1884, caused judgments to be entered upon these notes in the Superior Court of Cook County, Illinois, in favor of

the parties and for the amounts of principal and interest, and attorneys fees as follows:

National Bank of Illinois	Principal and interest	$12,074.00
	Attorneys fees	600.00
Siegmund Florsheim	Principal and interest	25,794.00
	Attorneys fees	1,289.70
Julius Heimann	Principal	5,000.00
	Attorney fees	250.00
Augustus Florsheim Henry Florsheim and Philip Florsheim	Principal and interest	5,031.00
	Attorneys fees	250.00
Julius Heimann No. 2.	Principal and interest	5,000.00
	Attorneys fees	250.00
Philip Florsheim	Principal and interest	9,000.00
	Attorneys fees	450.00
Simon Florsheim	Principal	5,000.00
	Attorneys fees	250.00
Herman Hahlo	Principal	2,500.00
	Attorneys fees	125.00
Herman Hahlo, Edward Stieglitz, Ernest Werner Julius Ballin and Elias Joseph	Principal	2,086.56
	Attorneys fees	104.34

The attorneys fees in the judgments were authorized to be confessed by the terms of the judgment notes, and amounted in all to $3,564.04.

Immediately after the entry of these judgments, and as part of the same scheme, the conspirators caused executions to be issued thereon and delivered to the sheriff of Cook County and caused him to levy upon the stock of merchandise of Heidweyer & Stieglitz, being all of their tangible property, and worth $125,000. Of this merchandise about $8,500 in value was replevied from the sheriff before sale, and the remainder was sold by him at a great sacrifice, producing $65,537.38. This amount, after payment of sheriff's fees, was applied and paid upon said executions as follows:

National Bank of Illinois in full - - -	$12,674.00
Siegmund Florsheim - - - - -	25,250.12
Julius Heimann - - - - - -	4,695.92
Julius Heimann, No. 2 - - - -	4,695.92
Philip Florsheim - - - - -	8,454.45
Simon Florsheim - - - -	4,695.92

The proceeds of the sale thus fell $9,565.50 short of paying the judgments.

The only other property of the insolvents was their bills receivable worth about $18,000, and accounts receivable worth about $6,000. As a part of the same scheme of preference Heidweyer & Stieglitz assigned and delivered these bills and accounts receivable to the defendant Simon Florsheim in trust, to collect the same for the benefit of said judgment creditors, as to the amounts unpaid on their aforesaid judgments, and for the benefit of himself, as to a claim of $1,300 dollars due to him by Norbert Stieglitz individually, the surplus, if any, to be returned to Heidweyer & Stieglitz. Out of the accounts and bills receivable so assigned, and out of the goods replevied from the sheriff and surrendered or paid for, the defendants, Siegmund, Philip and Simon Florsheim, received the amounts of their judgments and interest and said attorneys fees in full, the defendant Simon Florsheim received payment in full of his claim against the defendant Norbert Stieglitz, and the entire scheme originally devised by and between Heidweyer & Stieglitz, and the judgment creditors was successfully accomplished, and all the property of the defendants, Heidweyer & Steiglitz, was appropriated to prefer these creditors, to the exclusion of all others.

The bill further alleges that the several judgment notes, judgments entered thereon, executions issued, levies and sales thereunder, transfers, assignments and other dispositions of all their property made by Heidweyer &

Stieglitz on and subsequent to September 16, 1884, were in effect but one transaction, and taken together constitute a general assignment for the benefit of creditors, in which the several preferred creditors are chargeable as assignees and trustees of the property, which by means of these transactions came to their hands: that the transactions were all entered into and consummated in pursuance of a conspiracy between the parties thereto, to defraud the other creditors of Heidweyer & Stieglitz, and in fraud of the laws of Illinois, and that the parties are jointly and severally liable to account for all of said property at its true value, when they received it, and not at the amount for which it was sold; and are not entitled to share in any manner in the distribution of the fund so produced until after all the non-offending creditors have been fully paid.

It further alleges that while these transactions constitute an assignment for the benefit of creditors, yet said assignment is fraudulent and void as to creditors: that the judgment notes were purposely given for sums greater than was due the payees thereof respectively, at the time they were so given; that the sum provided for attorneys fees amounting to $3,564.04 was included in the judgments, and thereafter collected thereon, and was so inserted with actual intent to hinder, delay and defraud the creditors of Heidweyer & Stieglitz, and actually has defrauded them; that thereby the notes, judgments and everything that was done under them became wholly fraudulent and void as to the creditors of Heidweyer & Stieglitz; that all of said transactions constituting such assignment, were conceived and executed from beginning to end with the sole and only purpose of defrauding the law and defrauding all the creditors not intended to be protected thereby, including the complainants.

The bill as amended further alleged that at the time of the failure and since then the complainants were resi-

dents of the City of New York, and the defendants residents of the City of Chicago; that immediately after the failure complainants caused an investigation to be made as to the genuineness of the indebtedness represented by the judgments, and the good faith of the judgment creditors in having them entered; that it was then given out, and stated to the complainants by each of the defendant judgment creditors, that their judgments were for full value, and were entered aggressively by them for the sole purpose of realizing the moneys due them respectivety, and that they did so without the knowledge or procurement of the debtors themselves, and said debtors then stated that they had still a large amount of property remaining in their hands in the form of book accounts and bills receivable, applicable to the payment of their other debts, and that they proposed to convert the same and apply the proceeds thereof to such payment as soon as possible. Relying upon these statements, the complainants refrained for a considerable time to take legal measures to collect the large indebtedness due them, in the belief also that the transactions as to said judgments were *bona fide*, and having no knowledge or information of any fact tending to show that they constituted, constructively, an assignment for the equal benefit of all creditors. A long time afterward and within less than one month from the time of bringing this suit, the complainants for the first time learned, not only that said judgments took all the tangible property of Heidweyer & Stieglitz, but that the entry thereof was procured by them for the express purpose of preferring the judgment creditors, and that at the same time they transferred all their remaining property to a trustee for the benefit of creditors as heretofore in this bill alleged, thereby creating an assignment as herein alleged. The complainants Hardt, Von Bermuth & Co. and E. C. Dillingham, had in the meantime diligently pursued

their ordinary remedies at law for the recovery of the amount due them by bringing suit against Heidweyer & Stieglitz, recovering judgment and issuing execution which was ineffectual. The complainants, Schnabel Brothers and Viet or Achelis, on learning the above mentioned facts, at once proceeded to reduce their several claims against Heidweyer & Stieglitz to judgment in order to lay the foundation for the present chancery proceeding, all of which was ineffectual.

The bill waived an answer under oath, and prayed—in addition to the usual prayer for discovery, a Receiver and for general relief—that the confessions of judgment, transfers of accounts, etc., made by Heidweyer & Stieglitz, be decreed to constitute an assignment for the benefit of creditors with illegal preferences; that the preferences in favor of the co-defendants be set aside, and they be compelled to account for the value of the property at the time it was taken: that the preferential transfers be also decreed to be fraudulent and void as to the complainants and other creditors, and be vacated and set aside as fraudulent; that the defendants be charged with the value of the property so fraudulently received by them, and the money distributed among the complainants and other *bona fide* creditors entitled to share therein, and that the defendants be excluded from participation in the fund, even to the extent that their claims might be valid on account of the frauds of which they have been guilty.

It will be seen from this statement of the facts which are admitted by the demurrer that the complainants claim relief upon two grounds:

1. That the transfers by which the entire property of Heidweyer & Stieglitz was disposed of amounted in law to an assignment for the benefit of creditors within the meaning of the statute of Illinois, and that under that statute

the preferences in favor of the various co-defendants were illegal and void.

2. That these transfers were made with the intent and for the purpose of hindering, delaying and defrauding the creditors of Heidweyer & Stieglitz, and were therefore fraudulent and void as to such creditors under the general principles of law governing such transfers.

The demurrer of the National Bank of Illinois, Siegmund, Philip, and Simon Florsheim, presented as special points against the bill:

1. That the complainant had been guilty of laches.

2. That the court had no jurisdiction of the subject matter.

3. That Herman Hahlo and the members of the firm of Hahlo, Stieglitz & Co. were necessary parties defendant (*Transcript, p. 24.*)

The errors assigned on the record are as follows (*Transcript, pp. 28-9*):

1. The circuit court erred in sustaining the demurrer.

2. The circuit court erred in dismissing the amended bill.

3. The circuit court erred in not granting the relief prayed for by the amended bill.

4. The circuit court erred in not setting aside the judgment notes, the judgments entered thereon, the executions issued, and the levies and sales thereunder, the transfers, assignments and other dispositions of their property made by Heidweyer & Stieglitz in the amended bill described on the ground of fraud.

5. The circuit court erred in not decreeing that the said transactions were entered into and consummated in pursuance of a conspiracy to defraud appellants and other creditors of Heidweyer & Stieglitz who were not parties thereto.

6. The circuit court erred in not decreeing that the said transactions were fraudulent and void in that the said judgment notes were purposely given for sums greater than those actually due the payees of said notes respectively at the times they were so given.

7. The circuit court erred in not decreeing that the said instruments and transactions were fraudulent and void, in that the provision in said notes for attorneys' fees was inserted with actual intent to hinder, delay and defraud the creditors other than the payees of said notes.

8. The circuit court erred in not decreeing that the said instruments were executed and the said transactions entered into and consummated in fraud of the laws of the State of Illinois.

9. The circuit court erred in not decreeing that the instruments and transactions above mentioned constituted in effect but one instrument and one transaction.

10. The circuit court erred in not decreeing that the said instruments and transactions constituted an assignment for the benefit of creditors.

11. The circuit court erred in not decreeing that the said instruments and transactions were illegal and void under the provisions of the act of the state of Illinois concerning voluntary assignments for the benefit of creditors.

12. The circuit court erred in not decreeing that the provision made by Heidweyer & Stieglitz for the payment of certain of their creditors and the actual payments to them, as in the amended bill described, constituted preference in said assignment.

13. The circuit court erred in not decreeing that appellees Sigmund, Philip, and Simon Florsheim and the National Bank of Illinois were chargeable as assignees or trustees of the property that came to their hands by means of the said instruments and transactions.

14. The circuit court erred in not decreeing that appellee Simon Florsheim was chargeable as assignee or trustee of the property that came to his hands by means

of the transfer to him of the accounts and bills receivable in the amended bill described.

The points presented by these assignments of error and the special grounds stated in the demurrer may be summarized as follows:

I.

THE PREFERENCES GIVEN BY HEIDWEYER & STIEGLITZ AT THE TIME OF THEIR FAILURE IN OCTOBER 1884 WERE VOID UNDER THE ASSIGNMENT ACT OF ILLINOIS WHICH PROVIDES AS FOLLOWS:

"Every provision in any assignment hereafter made in this state providing for the payment of one debt or liability in preference to another, shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof."

1 Starr & Curtis Annotated Statutes of Illinois chapter 72 § 13.

Preston v. *Spaulding* 120 Ill. 208.

Schroeder v. *Walsh* 120 id. 403.

Hanford Oil Co. v. *First Nat'l. Bank* 126 id. 584.

Hide & Leather Nat'l. Bank v. *Rehm*, 126 id. 461.

Weber v. *Mick*, 131 id. 520.

Farwell v. *Nilsson*, 133 id. 45.

Farwell v. *Cohen*, 130 id. 216.

Heuer v. *Schaffner*, 30 Illinois Appellate Ct. 337.

White v. *Cotzhausen*, 129 U. S. 329.

Hanchett v. *Waterbury*, 115 Ill. 320.

Holt v. *Bancroft*, 30 Ala. 193.

II.

THESE PREFERENTIAL TRANSFERS, IF NOT VOID UNDER THE ASSIGNMENT ACT, WERE GIVEN AND RECEIVED WITH THE INTENTION, AND FOR THE PURPOSE, OF HINDERING, DELAYING AND DEFRAUDING CREDITORS, AND WERE THEREFORE FRAUDULENT AND VOID AS TO THEM.

Hulse v. *Mershon*, 125 Ill. 52.
Gardner v. *Commercial Bank*, 95 id. 298.
Bump on Fraudulent Conveyances, 273 & 280.
Weden v. *Hazen*, 10 Conn. 50.
Russell v. *Winne*, 37 N. Y. 591.
Holt v. *Cramer*, 34 N. J. Eq. 187.
Hedden v. *Harrison*, 2 N. J. L. J. 370.
Horton v. *Williams*, 21 Minn. 187.
Mitchell v. *Sawyer*, 115 Ill. 65.
Harting v. *Jockers*, 130 id. 627.
Baylor v. *Brown*, 21 Southwestern Reporter (Texas) 73.
Oppenheim v. *Halff*, 68 Texas 412.
Lobstein v. *Lehr*, 120 Ill. 549.
Natl. Tube Works v. *King Refrigerating & Ice Mach. Co.*, 22 Southwestern Reporter (Mo.) 947.
Webb v. *Ingham*, 29 W. Va. 389.
Murray v. *Bostwick*, 13 Ill. 409.
Bates v. *Henney*, 32 id. 131.
Reid v. *Noyes*, 48 id. 323.
Strohn v. *Hayes*, 70 id. 41.

III.

NO LACHES ON THE PART OF APPELLANTS IS SHOWN SUCH AS PRECLUDES THEM FROM OBTAINING RELIEF AGAINST A FRAUD ON THEIR RIGHTS.

Gibbons v. *Hoag*, 95 Ill. 45.

Hubbard v. *U. S. Mortgage Co.*, 14 Bradwell (*Illinois Appellate Court*. 40.)

I.

THE PREFERENCES GIVEN BY HEIDWEYER & STIEGLITZ AT THE TIME OF THEIR FAILURE WERE VOID UNDER THE ASSIGNMENT ACT OF ILLINOIS.

The particular provision of the Assignment Act to which we refer as invalidating these preferential liens, is the section which declares void a "provision in any "assignment * * * for the payment of one "debt or liability in preference to another." It is at once apparent that the examination of this question must stop here, if the statute above quoted refers only to preferences which are given by the express terms of a deed of assignment for the benefit of creditors. But the meaning of the statute on this point is no longer in doubt, and is not an open question. The Supreme Court of Illinois has held that the statute applies equally to preferential provisions in a *deed* of assignment, and to preferential transfers or liens created in contemplation of an assignment; and that the preference is void whether it is in the form of a transfer or of a lien secured by legal process through the aid or connivance of the debtor. The first case in which this construction of the statute was announced was *Preston* v. *Spalding*, 120 Ill. 208, where confessions of judgment, entered with the intention of following them immediately with an assignment, were set aside as coming within the prohibition of this section. In speaking of the effect of

the statute upon the common law right of preference, the court said:

"When he (the debtor) reaches the point where he is ready, and determines to yield the dominion of his property and makes an assignment for the benefit of his creditors, under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate, not exempt by law, to his assignee—rendering void all preferences, and bringing about the distribution of his whole estate equally among his *bona fide* creditors; and we hold that it is within the spirit and intent of the statute that when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken—the law will regard all his acts having for their object and effect the disposition of his estate, as parts of a single transaction; and on the execution of the formal assignment, it will, under the statute, draw to it and the law will regard as embraced within its provisions, all prior acts of the debtor having for their object and purpose their voluntary transfer or disposition of his estate to or for creditors, and if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given the assignment, and such preferences will, in a court of equity, be declared void, and set aside, as in fraud of the statute."

"This voluntary assignment act is in its character remedial and must, therefore, be liberally construed, and no insolvent debtor, having in view the disposition of his estate, can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment, and any other shift or artifice under the forms of law; and whatever obstacles might be encountered in other courts of this State, a court of equity, when properly invoked was bound to look through and beyond the *form*, and have regard to the substance, and having done so, to find and declare these preferential judgments void and to set them aside."

The same point was subsequently before the court in *Hanford Oil Co.* v. *First Nat'l Bank*, 126 Ill. 584, and *Hide & Leather Nat'l Bank* v. *Rehm*, Ibid. 461, in both of which cases the preference was created by a confession of judgment.

In *Hanford Oil Co.* v. *First Nat'l Bank* it is said:

"Notwithstanding the voluntary assignment act a debtor, though insolvent may still secure, by mortgage or confession or otherwise, a *bona fide* indebtedness, if done in good faith and not in contemplation of making an assignment under said act. When, however, the debtor enters upon a course of conduct having for its object the disposition of all his estate for the benefit of his creditors, and as part of the plan by which to effect that object, executes a general assignment, the distribution must be to his creditors in proportion to the amounts of their respective claims. This question was before this court in a case of very considerable importance, and there received full consideration; and we then, with entire unanimity, announced the doctrine, that any preference obtained by the creditor by or through the acts of the debtor, after the debtor had determined to yield dominion of his estate by making a general assignment for the benefit of creditors, fell within the prohibition of the statute, and was therefore void. (*Preston* v. *Spaulding*, *supra*.) All the acts of the debtor performed with the intent and for the purpose of effecting a disposition of all his property for the benefit of his creditors are to be regarded as a single transaction, each constituting parts of the general assignment of his assets under the statute."

And in *Hide & Leather Nat'l Bank* v. *Rehm* it is said:

"Weber (the debtor) had abandoned all hope of extricating himself from his financial embarrassments, or of continuing longer in business, and was busied solely with a consideration of the disposition to be made of his assets, in view of the impending and inevitable catastrophe. So long as he is clearly shown to have entered upon the dis-

position of his property for the benefit of his creditors at the time he made the judgment notes, the law will indulge in no refinements in order to fix the precise point at which he reached the determination to make a general assignment. All that was done will rather be viewed as parts of the same transaction, so as to make it immaterial whether the determination to make the assignment in fact preceded or followed the execution of the judgment notes."

These decisions establish, beyond any controversy, four propositions as to the effect of the statute upon the right of preference and as to the principles which should govern its construction:

1. That the preference need not be contained in a written assignment.

2. That the substance of the transaction will alone be considered, and not its form; and that no artifice contrived for the evasion of the statute will be upheld.

3. That separate transfers or liens, created in pursuance of one common plan for the disposition of the debtor's estate, will be construed as one transaction.

4. That the intention of the parties *not* to execute a statutory assignment, or not to have the transaction operate as such, will have no effect upon the determination of its legal effect.

It is also settled that a court of equity has power, in appropriate cases, to set aside preferences given in fraud or violation of the statute.

It being the law that a debtor who has determined to transfer his property to an assignee for the benefit of his creditors, cannot create a preference by a separate instrument, or by any contrivance for that purpose, the primary question to be investigated and settled is, what is an assignment for the benefit of creditors which will come within the meaning of this statute and the spirit of these

decisions? We need not go beyond the decisions of this court and the Supreme Court of Illinois to determine the question; for in several cases the word "assignment" as used in this statute has been defined, and the characteristics by which it may be recognized enumerated.

In *Preston* v. *Spaulding*, *supra*, it is said: "The statute "is silent as to the form of the instrument or instruments "by which an insolvent debtor may effect an assign- "ment." In *Schroeder* v. *Walsh*, 120 Ill. 403 (decided at the same time as *Preston* v. *Spaulding*), speaking of this statute, it was said: "That act applies only to convey- "ances of property to an assignee *or trustee*, in trust, to "convert the same into money for the benefit of creditors "of the assignor, which can now only be made under that "law." And almost the same words are used in *Weber* v. *Mick*, 131 Ill. 520. A somewhat further statement or definition is made in *Farwell* v. *Nilsson*, 133 Id. 45, where it is said:

"The word assignment had, at the time this statute was adopted, a well-defined meaning, and it has no different meaning in said act. According to the common acceptation of the term, it is a transfer, without compulsion of law, by a debtor of his property to an assignee, in trust, to apply the same, or the proceeds thereof, to the payment of his debts, and to return the surplus, if any, to the debtor * * * * The mere form of the instrument is no doubt immaterial, *provided the operation of it is to create a trust in the property conveyed for the benefit of creditors, and if such is the purpose and design of the instrument, then any preference in it, or which by construction of law forms a part of it, is a fraud on the statute and void.*"

The Assignment Act of Illinois was before this court for construction, upon this point, in the case of *White* v. *Cotzhausen*, 129 U. S. 329. In that case, as in the one at

bar, a bill was filed by a judgment creditor to set aside preferences given by an insolvent debtor.

The conveyances which were assailed by the complainant were two deeds of real estate to separate grantees, executed on July 16, a bill of sale executed on July 18, to another creditor and a judgment entered in the following September upon a judgment note given on July 21. The consideration for all these transfers was the prior indebtedness of the grantor to the several grantees. Cotzhausen, a judgment creditor, filed a bill to set aside these conveyances and the confession of judgment upon the ground that they were made without adequate consideration, and on the ground that the transfers amounted to an assignment for the benefit of creditors, with preferences, contrary to the Illinois statute. In commenting on the situation of White —the debtor—at the time of these transfers, and in stating the question to be decided, Judge HARLAN says:

"He recognized his hopelessly insolvent condition, and formed the purpose of yielding to creditors the dominion of his entire estate. And it is too plain to admit of dispute, that, in executing to his mother, sisters and brother the conveyances, bill of sale, warrant of attorney and transfers in quesition, his intention was to give them, and their intention was to obtain, a preference over all other creditors. What was done was in execution of a scheme for the appropriation of his entire estate by his family to the exclusion of other creditors, hereby avoiding the effect of a formal assignment.

"The first question, therefore, to be considered is, whether the several writings executed by Alexander White, Jr., for the purpose of affecting that result, may be regarded as, in legal effect, one instrument, designed to evade or defeat the provisions of the statute of Illinois, known as the Voluntary Assignment Act."

He then quotes the provisions of the statute, and the decision of the Supreme Court in *Preston* v. *Spaulding*,

states the distinction between the two cases, and disposes of it in this way:

"It is true there was not here, as in *Preston* v. *Spaulding*, a formal deed of assignment by the debtor under the statute. But of what avail will the statute be in securing equality among the creditors of a debtor, who, being insolvent, was determined to yield the dominion of his entire estate, and surrender it for the benefit of creditors, if some of them can be preferred by the simple device of not making a formal assignment, and permitting them, under the cover or by means of conveyances, bills of sale or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors? * * * Shall a failing debtor be allowed to employ indirect means to accomplish that which the law prohibits to be done directly? These questions must be answered in the negative. They could not be answered otherwise without suggesting an easy mode by which the entire object of this legislation may be defeated." * * * *

"By the conveyances, bill of sale, confession of judgment and transfers, all made about the same time, and pursuant to an understanding previously reached, he (the debtor) has effected precisely the same result as would have been effected by a formal assignment to a trustee for the exclusive benefit of his mother, brothers and sisters. The latter is forbidden by the letter of the statute, and the former is equally forbidden by its spirit. Surely the mere name of the particular instruments by which the illegal result is reached, ought not to be permitted to stand in the way of giving the relief contemplated by the statute. Courts of equity are not to be misled by mere devices, nor baffled by mere form."

These were all cases in which it was contended, on behalf of the attacking creditors, that the effect of the statute was to abolish the right of preference by failing debtors. In each of these cases, except *Schroeder* v. *Walsh* and *Weber* v. *Mick*, the preferences sought to be set aside were created by confession of judgment either alone or in connection with other transfers: in *Schroeder* v. *Walsh*

the alleged preference was a sale of a stock of goods, and in *Weber* v. *Mick* it was a chattel mortgage in the usual form. In none of them did the debtor convey all, or any part, of his property to a trustee, nor was a trust in favor of creditors created in any way.

Following these decisions came the case of *Farwell* v. *Cohen*, 138 Ill. 216, the most recent and most important decision under the statute. In that case the debtor executed but one instrument, a conveyance of his stock of goods to one creditor *in trust* for himself and five other creditors. The conveyance was intended by the parties to operate as a chattel mortgage for the security of the preferred creditors, but on the petition of unsecured creditors the County Court of Vermilion County held it to be an assignment, which should be administered for the benefit of all creditors, and the Supreme Court sustained the decision. In so deciding, the definitions of the word "assignment" quoted above are referred to by the court, and their correctness reaffirmed, and upon this point the following language is used:

"In the case of *Weber* v. *Mick*, 131 Ill. 520, in speaking of the subject of a voluntary assignment for the benefit of creditors, we said that such an assignment was and had 'always been understood to be an instrument voluntarily executed by a failing debtor by which he assigns to some third person, as assignee or trustee, the whole, or sometimes the bulk, of his property, to be by such trustee distributed among the assignor's creditors, in satisfaction of their demands.'

"*Schroeder* v. *Walsh*, 120 Ill. 403, this court in speaking of such assignments and of the statute of 1877, said: 'That act applies only to conveyances of property to an assignee or trustee, in trust, to convert the same into money for the benefit of creditors of the assignor,' and to this statement was added the further clause, 'which can now only be made under that law.' Since the right and power of the failing debtor to pass title to an assignee

remain as they did before the statute, and since the mere form of the instrument is immaterial, provided it operates to create a trust for the benefit of creditors, and since the word 'assignments' found in the act has no different meaning than that which it had at the time the statute was adopted, and prior thereto—it would seem that the expression 'which can now only be made under that law,' signifies merely that all voluntary assignments for the benefit of creditors must be carried into execution in conformity with the principles and rights established by that act and that administration of the trusts may be enforced by the court to which the act gives jurisdiction over the particular subject matter of such voluntary assignments."

And in speaking of the intention with which the conveyance was executed, the court said: "No matter what "they call the instrument, the law makes it a voluntary "assignment. Nor is it a matter of any moment that "they supposed it was an instrument for the benefit of a few "chosen creditors; *for the statute enlarged the trust and* "*made it enure to the benefit of all creditors.*"

The conveyance in that case was held to come within the operation of the statute, although it did not cover all the debtor's property, or provide for all his creditors, the court holding that the assignment act did not alter the power of a failing debtor to pass title to an assignee, but that "the power to control the distribution and beneficial "enjoyment of his property upon such a transfer of the "title is essentially different from what it was before the "statute."

In the case of *White* v. *Cotzhausen*, *supra*, this court held that the execution of an instrument creating a technical trust in favor of creditors is not essential to bring a case within the operation of the statute; that the substance of the transaction will alone be regarded, and when its effect is to transfer the dominion and control of the property from the debtor to a few of his creditors, to the exclu-

sion of others, a case is presented which is within the statute, and upon which its remedial provisions operate by avoiding the preferences. And it is held that the Assignment Act governs transfers by insolvent debtors when they seek to evade it, as well as when they act under it; in this respect following and applying the rule in *Hanchett* v. *Waterbury*, 115 Ill. 220, where it is said that this statute "is, in its framework and detail, a general insolvent law, and that it was so intended by the legislature."

After the decision of *White* v. *Cotzhausen*, by this court the case of *Farwell* v. *Nilsson* 133 Ill. 45 was decided by the Supreme Court of Illinois. In that case confessions of judgment entered against an insolvent, but neither involving nor connected with any trust for the benefit of his creditors, were attacked by the bill as being void under the assignment law. The court held that the statute did not wholly abolish the right of preference, and that a debtor might still confess judgment in favor of one or more creditors, if done in good faith and not connected with any transfer by which a trust was created. This decision—aside from being clearly distinguishable from the case at bar—is, we submit, not to be regarded as an authority which is binding on this court on this point. For this court has adopted the rule that where it construes a state statute in advance of a construction by the state court, it will adhere to its own construction, even though the state court afterwards construes the statute differently. This was decided in *Burgess* v. *Seligman*, 107 U. S. 20, where a law of Missouri involving the rights of stockholders was construed by the United States Circuit Court. Afterward the Supreme Court of that state had the same statute, the same transaction, and some of the same parties before it, and adopted a contrary construction. The case decided by the Circuit Court was taken to this court, and

the decision of the state Supreme Court passed upon it as binding. In declining to so hold, this court said:

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the State courts if the question seems to them to be balanced

with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals, which it might be supposed, would be unaffected by local prejudice and sectional views, it would seem to be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

To the same effect is the case of *Pana* v. *Bowler*, 107 U. S. 529 (540).

It is perhaps not strictly necessary to now determine whether this court would follow the decision in *Farwell* v. *Nilsson* in a case involving the same facts. For the case at bar presents an element distinguishing it in a most material respect from *Farwell* v. *Nilsson*. There was in that case no trust of any kind, while here accounts and bills receivable amounting to $24,000, were conveyed to Simon Florsheim in trust for himself and the other preferred creditors. This transfer was a part of the scheme devised and carried out by the debtors and their attorneys who were acting also for the preferred creditors. (*Transcript pp.* 5-6.) So that these parties, all acting under the same advice and in pursuance of a common plan, transferred all their tangible property to the preferred creditors through the medium of the sheriff, and the rest of their property to the same persons through the medium of Simon Florsheim as trustee. It is settled by the decision in *Farwell* v. *Cohen*, *supra*, that a transfer by an insolvent debtor of a part of his property to one creditor as trustee for himself and a few others is an assignment

within the meaning of the act, and that the statute enlarges the trust, and makes it enure to the benefit of all creditors. And the decisions in the cases of *Preston* v. *Spalding*, *Hide and Leather Nat'l Bank* v. *Rehm* and *Hanford Oil Co.* v. *First Nat'l Bank* settle the rule that where a failing debtor makes several different conveyances of his property in pursuance of a common plan, they will all be construed as one transaction; and if one of the transfers is an assignment for the benefit of creditors, all of the preferences will be held to be a part of it and will be declared void.

Nor is this trust in the assignment of the accounts the only one in the transaction. The judgment in favor of the defendant, Siegmund Florsheim was not given merely for a debt due him, for the firm owed him only $2,628 while the judgment in his favor, including attorneys fees was $27,083.75. The greater part of this was to protect him against an alleged liability as endorser on notes of the firm, some of which had more than a year to run. (*Transcript pp. 3-4*). The money which Siegmund Florsheim received when this judgment was paid he received in trust for the holders of these notes, and the security enured to their benefit, and a trust was created in their favor. The effect of the transaction then was that $27,083.75 was placed in his hands, of which $1,289.70 was a mere gratuity in the way of attorneys fees—equal to half the debt actually due him—of the balance $2,628 was to apply on his own claim and the remainder, $23,166.05 he held in trust to pay the holders of the notes which he had endorsed.

This precise question was determined in the recent case of *Pendery* v. *Allen*, 33 Northeastern Reporter (Ohio) 716. The statute of that state has by its Supreme Court been construed to provide that when an insolvent debtor conveys property to a creditor to pay himself and another,

the trust is enlarged for the benefit of all creditors, and the transaction will be treated as an assignment for the benefit of creditors. Thus precisely the same effect is given to the statute as in *Farwell* v. *Cohen*, *supra*, where it is said that a trust in favor of a few creditors will be enlarged to include all. A mortgage was given to a surety to protect his liability on the notes of the insolvent mortgagor, and the transaction was attacked as being an assignment for the benefit of creditors. Upon this point the court said:

"A creditor may secure himself by taking a mortgage, but in doing so he must deal with an eye single to his own interests. If he attempts to extend the lien beyond the necessity of his own indemnity, and secure the debt of any other creditor, the mortgage is in substance and legal effect, an assignment within the meaning of Section 6343 Rev. St., and the mortgagee being a trustee for such other creditors, under the statute becomes a trustee for all the creditors of the mortgagor. *Bloom* v. *Noggle*, 4 Ohio St. 602. Whether a grantee or transferee of any kind is to be regarded as such trustee depends, as said in *Dickson* v. *Ralston*, 5 Ohio St. 218,' upon the question whether by the terms of the instrument or by necessary implication he is liable to account to the preferred creditor for the property in his hands, and for the manner in which he disposes of it. If a court of chancery, at the instance of the creditor, would compel him thus to account the character of the transfer and his own position are thereby determined, and the statute then steps in and enlarges the trust, and makes it enure to the benefit of all the creditors, and distributes the fund to all in proportion to their respective demands.'"

"It is a well settled rule in equity that where a surety, for his own indemnity, takes a collateral security from his principal, such security is regarded in equity as a trust for the better security of the debt, and chancery will compel the execution of the trust for the benefit of the creditor (citing cases). The rule is not limited, but applies as well to one standing in the situation of a surety as to one standing strictly and formally in that relation.

* * * The authorities place the principle upon the ground that as the security is a trust for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him at the time of the purchase of the security for which it may have been given as indemnity. The effect of such a transaction is the placing of means in the hands of the surety by the principal debtor to meet liabilities on account of his contract of suretyship. It is consequently a trust for that specific purpose, and equity will control the legal title to it in the hands of the surety, so that it may be applied to the object intended, viz: the payment of the debt to the holder."

If the sole transaction involved in this case were a confession of judgment by Heidweyer & Stieglitz in favor of Siegmund Florsheim, to protect him against his liability as endorser of the paper of the firm to become due in the future, the trust created by the transaction in favor of the holder of the paper, would be very clear. Is it any less so, by reason of the other concurrent transactions, or because a debt due to Florsheim was also included in the note? The point to be determined is, was there a trust created in the language of the Illinois assignment act "for the benefit of creditor or creditors." If there was, under the doctrine of *Farwell* vs. *Cohn*, *supra*, all the other transactions must be imported into the one creating the trust, and the whole treated as an assignment for the common benefit of creditors. The intent of the public and the form of the transaction, as shown by that case, is wholly immaterial. It is the effect of what they did, and not what they intended, that will control.

We have contended that these judgments and the assignment of the accounts must be construed together, and that so construed they amount to an assignment with illegal preferences. Such seems to us to be the true rule to be applied. But if the assignment of the accounts and

the judgments be considered separately, the complainants are still entitled to relief. For the transfer of the accounts, taken by itself was a partial assignment, *i. e.*, an assignment of a part of the debtors' property for the benefit of a part of their creditors. It is held in *Farwell* v. *Cohen*, *supra*, that such assignments are within the statute and must be administered for the benefit of all creditors, and that relief was actually given in that case. The same effect attaches to the judgment to Siegmund Florshiem if it be considered by itself and not as a part of the other transactions. So that whether the transfers be considered as a whole, or separately, the complainants are entitled to relief.

II.

THE PREFERENTIAL TRANSFERS MADE BY HEIDWEYER & STIEGLITZ WERE VOID BECAUSE MADE TO HINDER, DELAY AND DEFRAUD CREDITORS.

It is alleged in the bill that the warrants of attorney, on which the confessions of judgment against Heidweyer & Stieglitz were entered contained a provision authorizing the including of the creditors attorneys fees in the judgments; that the attorneys fees amounted to $3,564.04, all of which was paid to the preferred creditors from the proceeds of the sale of the stock by the sheriff and from the accounts assigned to Simon Florsheim as trustee. It is further alleged that this was done with actual intent to hinder, delay and defraud their creditors and that the judgments were entered and assignment of accounts made in furtherance of the same plan and with like intent. (*Transcript pp. 5–6*). The notes and powers of attorney containing the provision for attorneys fees and on which the judgments were entered, were not separate instruments but both the note and the power of attorney were over the same signature.

These attorneys fees were substantially a gift from the insolvent firm: there was no liability on their part to pay them, and their act in including them in the judgments was a mere gratuity. That a debtor has no right to give away his property at the expense of his creditors is a maxim of the common law, and an attempt to do, is a fraud.

"A gift by a person unable to pay his debts so directly and inevitably tends to delay and hinder creditors, and so plainly violates the duty of moral honesty, that the least regard to fair dealing and integrity renders it necessary to pronounce it void. Such a transaction is not to be looked on only as a means by which the intent to defraud may be inferred. The act is altogether incompatible with a contrary intent. It is an act of fraud in itself."

Bump on Fraudulent Conveyances, 280.

The case presented by the bill on this question of attorneys fees, it will be observed, is not one of constructive fraud, as where a person has unwittingly done something which is not permitted by law. These parties all knew that providing for these attorneys fees in the judgment notes and inserting them in the amount of the judgments by which their property was to be placed beyond the reach of other creditors, was simply appropriating it to the payment of a fictitious liability. It was paying the preferred creditors more than they were entitled to and, as all parties knew, such payment was at the expense of the other creditors. It placed an additional barrier between the property and the claims of *bona fide* creditors, by increasing the amount of the liens upon it. This was done deliberately by the joint act of the debtors and the preferred creditors. The bill alleges that it was done with the actual intent and purpose of hindering, delaying and defrauding creditors; but were it not expressly alleged that fact would appear from the inherent nature of the act itself.

In the case of *Hulse* v. *Mershon*, 125 Ill. 52 the Supreme Court of Illinois held that paying attorneys fees under such circumstances is a fraud on creditors. The case was decided on an agreed statement of facts, by which it was stipulated that the recovery should be limited to the amount of the fees. The court held that, "When a man voluntarily and without consideration puts his property out of his hands, being at the time in debt, his act in so doing is, as to pre-existing creditors, fraudulent and void." In the case at bar it is alleged in the bill that the attorney's fees were included in the judgments for the purpose of hindering, delaying and defrauding creditors. The fraud, therefore, infects the entire transaction and makes the judgments and the transfer of accounts wholly fraudulent and void.

That a transaction which has as one of its objects a fraud on creditors is wholly fraudulent as to them, even though made on a good consideration, is well settled by the authorities. In *Russel* v. *Winnie*, 37 N.Y. 591 it is said on this point:

"The mortgage was one single instrument given to secure one debt. To render it valid it must have been given in good faith, and for the honest purpose of securing the debt, and without any intent to hinder or defraud creditors. This cannot be true when the object, in whole or in part, or as to part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument. The unlawful design of the parties cannot be confined to one particular parcel of the property. Entire honesty and good faith is necessary to render it valid; and whenever it indisputably appears that one object was to defraud creditors, to any extent, the entire instrument is, in judgment of law, void."

"It is vain to speculate upon his motives or adduce evidence of a fair purpose. The presumption in such a case is conclusive, and against it, all other evidence is unavailing. The debtor may have some other purpose in

view, but the intent to defraud is a part and parcel of his act."

Bump on Fraudulent Conveyances 272.

See also

Holt v. *Creamer*, 34 N. J. Eq. 187.

This was a case of a mortgage given for a sum in excess of that actually due, and the court, citing *Russell* v. *Winne*, *supra*, declared the whole mortgage void.

"A deed which is fradulent in part as to creditors will be declared void *in toto*."

"It is well settled in this State, that a debtor has a right to prefer one creditor over others, provided such preference is honestly made. But another principle is equally well settled; that if the instrument of preference names a sum as its consideration which is larger than the real debt, the instrument is void, even as to the debt really due. The reason of this is that the purpose of such an instrument is to cover up the debtor's property and protect it against other creditors, and this is a fraud which infects the whole instrument, and makes it void; when such an instrument is void a creditor is at liberty to disregard it, and can levy on the property in spite of the mortgage or conveyance."

Horton v. *Williams*, 21 Minn. 187.

See also:

Hefner v. *Irwin*, 1 Fedel. Law, 490.
Weeden v. *Hazes* 10 Conn. 50.,
Gardner v. *Commercial Bank*, 95 Ill. 298.

In the last case it is said:

"If the intention be to hinder and delay creditors, it will vitiate the whole deed, though it be made upon a good consideration, or for the just and equitable purpose of securing an equal distribution."

Holt v. *Creamer*, 34 N. J. Eq. 187.
Hedden v. *Harrison*, 2 N. J. L. J. 370.
Mitchell v. *Sawyer*, 115 Ill. 65.
Harting v. *Jockers*, 136 Id. 627.

In the last case it was said, on an analogous point:

"When it is shown that the present consideration is inadequate to satisfy the debts, whatever may be the amount secured to the debtor, the law, instead of entering upon the task of determining what part of the consideration is money or other property and what part is to be paid as future support of the grantor, and holding the grantee responsible to the creditors for the latter sum, *treats the conveyance as a nullity* as between grantee and the creditors, and holds the property liable for their claims."

In some of the decisions the principle is stated to be that a conveyance which is made to hinder and delay creditors is not purged of the fraud by the fact that the parties also had in view some other and proper purpose, like the securing of a valid debt.

Murray v. *Bostwick*, 13 Ill. 409.
Boies v. *Henney*, 32 id. 131.
Reed v. *Noyes*, 48 id. 323.
Strohn v. *Hayes*, 70 id. 41.
Mitchell v. *Sawyer*, 115 id. 650.
Webb v. *Ingham*, 29 W. Va. 389.

Where several conveyances are made by an insolvent debtor as parts of one transaction, if one of them is fradulent as to creditors the fraud will infect all, and the court will not endeavor to separate the valid from the invalid.

Oppenheim v. *Halff*, 68 Tex. 412.
Baylor v. *Brown*, 21 Southwestern Reporter (Texas) 73.

According to the allegations of the bill in this case these insolvent debtors and the co-defendants in this case entered upon and carried out a plan of disposing of the debtors entire property with the actual purpose of hindering, delaying and defrauding their creditors. Upon the

facts before the court no good motive appears in the whole transaction. If there was any, the parties charged with the fraud should set it up by answer.

III.

The defense of laches.

It is set up in the demurrer as a special objection to the bill that the complainants have been guilty of laches. This claim is based upon mere delay in suing to set aside the fraudulent transactions; for no injury, resulting from the delay appears. The fraudulent transactions complained of occurred in October 1884, and the bill was filed in April 1889. The statutory limitation upon actions of this kind is five years from the time the complainant is in a position to bring suit. (2 Starr & Curtis, Statutes of Illinois, chap. 83, §15.) So that even if the cause of action had accrued, and appellants had been in a position to sue, on the day the fraudulent judgments were entered, the cause of action was not outlawed when the bill was filed. We understand the rule in equity to be that where the bar of the statute has not intervened the complainant's cause of action is not defeated unless, with knowledge, or means of knowledge, of the facts, he delays suit so that the rights of the defendants have been prejudiced, or rights of third persons have intervened. In such cases the complainant's delay, *coupled with injury resulting to the opposite party from it*, raises a sort of equitable estoppel against the assertion of his rights. When, on the other hand, the statutory period has elapsed, the claim *prima facie* is barred, unless the complainant states facts which, under the general rules of equity, remove the bar of the statute. The rule is thus stated by the Supreme Court of Illinois.

"Mere delay, alone, short of the period fixed as a bar by the Statute of Limitations, will not preclude the assertion of an equitable right. It is only when by delay and

neglect to assert a right, the adverse party is lulled into doing that which he would not have done, or into omitting to do that which he would have done in reference to the property, had the right been promptly asserted, that the defense of laches can be considered."

Gibbons v. *Hoag*, 95 Ill. 45 (69).

See also

Hubbard v. *U. S. Mortgage Co.*, 14 Bradwell (Illinois Appellate Ct.) 40.

In this case it cannot be pretended that any prejudice has resulted, or ever can result, to the defendants from the failure to bring suit against them at an earlier date. They got a large amount of money from this insolvent estate by means of fraudulent transfers and judgments, and have been simply keeping it. Delay in asking that they be compelled to yield up what they thus illegally obtained certainly could not injure them.

Further than this a suit of this character cannot be maintained until the creditor has exhausted his remedy at law by obtaining judgment and having execution returned unsatisfied. Until then he cannot sue to set aside a fraudulent conveyance; and it is clear that no neglect can be imputed to him before his right to sue accrues. The judgment of the original complainants, Hardt Von Bernuth & Co., was recovered on January 21, 1887, and the judgments of the intervening petitioners were recovered in November, 1885, and in May and November, 1889. It certainly is not true as an absolute proposition of law that a creditor cannot maintain a bill against a fraudulent grantee of his debtor, unless he files it within two years after recovering his judgment. If there are any special circumstances which would make the doctrine of *laches* applicable to this case they do not appear in the bill and should be set up in an answer to be made available.

In addition it appears that the defendants—as would perhaps be naturally expected—took active measures to conceal the true nature of the transactions by which they acquired the property of Heidweyer & Stieglitz; that shortly after the failure they stated to the complainants, who were all non-residents of Illinois, that all the judgments were entered made for full consideration and without any fraudulent motive, or collusion with the debtors, and that the latter retained their accounts and bills receivable and would pay their other debts with them. These statements were all false and misled the complainants, who did not learn of the true facts until within a month before the bill was filed. So that to the original illegal transaction there was added a fraudulent concealment by the guilty parties of its real nature. It does not lie in their mouths now to say that the complainants were negligent in believing what they said about the matter.

IV.

All necessary parties are before the court.

It is set up as a special ground of demurrer that Herman Hahlo and the members of the firm of Hahlo, Stieglitz & Co., are necessary parties to the bill. These persons were preferred creditors whose claims were not collected on their judgments, but were paid from the proceeds of the accounts assigned to Simon Florsheim in trust (*Transcript pp. 5-6*). They were citizens of New York, so that their presence as parties defendant would oust the jurisdiction of the court; for some of the complainants were also citizens of the state. The 47th Equity Rule provides that when persons who might otherwise be deemed necessary or proper parties cannot be made parties because they are out of the jurisdiction, or for other reasons, or because their joinder would oust the court's jurisdiction, the cause

may proceed without their being made parties, and the decree shall be without prejudice to their rights. This rule effectually disposes of the objection, which would not, in any event, be ground for dismissing the bill for want of equity; but the cause would merely stand over for the complainants to bring in the absent parties.

The presence of these parties, however, is a matter of no consequence to the defendants. For the amount of the recovery against them will not be increased nor their rights in any way affected by the absence of Hahlo, Stieglitz & Co.

If the bill in this case shows a right to relief against any of the defendants the decree dismissing it was erroneous. We submit that a clear case for equitable relief is shown and that the decree of the court below should be reversed.

TENNEY, CHURCH & COFFEEN,
Solicitors for Appellants.

DANIEL K. TENNEY,
EDWARD O. BROWN,
Chas. E. Pope *of Counsel.*

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

No. 14293.

No. 268.
DOCKET 1893.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

ENGLEBERT HARDT et al.,

vs.

SIGISMUND HEIDWEYER et al.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT ON BEHALF OF SCHNABEL BROTHERS, APPELLANTS.

SYDNEY RICHMOND TABER,
SOLICITOR AND OF COUNSEL FOR SAID APPELLANTS.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

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ENGLEBERT HARDT et al.,

vs.

SIGISMUND HEIDWEYER et al.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT ON BEHALF OF RICHARD AUGUST SCHNABEL AND AUGUSTE PHILLIPE MONTANT, CO-PARTNERS UNDER THE FIRM NAME OF SCHNABEL BROTHERS, APPELLANTS.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

The present case comes to this court on appeal from a decree of the Circuit Court for the Northern District of Illinois sustaining the demurrer to a bill in chancery, and dismissing the bill. (Rec., 48; Trans., 25, 26.)

The object and prayer of the bill was to have certain transactions of the firm of Heidweyer & Stieglitz, contemporaneous with their failure in business, set aside on the ground of fraud, and as being in contravention of the statute of Illinois relating to voluntary assignments for the benefit of creditors.

The principal facts alleged in the bill, and admitted by the demurrer, are as follows:

From about the month of July, 1875, to about the 15th of October, 1884, the appellees, Sigismond Heidweyer and Norbert Stieglitz, were engaged in business at Chicago, under the firm name of Heidweyer & Stieglitz, as jobbers of woolens and woolen goods. (Rec., 4; Trans., 2.) On September 16, 1884, they executed and delivered four judgment notes, bearing date of that day, payable on demand to the National Bank of Illinois, Siegmund Florsheim, Florsheim Brothers and Philip Florsheim, respectively (Rec., 7; Trans., 4); and on October 13, 1884, they also executed and delivered five other judgment notes, bearing the latter date and payable on demand to the following persons and firms, respectively: Julius Hermann (two notes), Simon Flersheim, H. Hahlo & Co. and Hahlo, Stieglitz & Co.

On October 15, 1884, judgments by confession were entered on the said notes in the Superior Court of Cook County, Illinois, in favor of the parties, and for the amounts of principal and interest and attorneys' fees, as follows (Rec., 7, 8; Trans., 4):

National Bank of Illinois,	Principal and interest	$12,074.00
	Attorneys' fees.....	600.00
Siegmund Florsheim,..	Principal and interest	25,794.05
	Attorneys' fees,.....	1,289.70
Julius Heimann,.....	Principal.....	5,000.00
	Attorneys' fees,.....	250.00
Julus Heimann,.....	Principal.....	5,000.00
	Attorneys' fees.....	250.00
Augustus Florsheim... Henry Florsheim and Philip Florsheim,.....	Principal and interest,	5,031.00
	Attorneys' fees.....	250.00
Philip Florsheim,.....	Principal and interest,	9,000.00
	Attorneys' fees,.....	450.00

Simon Florshe'm,.....	Principal and interest,	5,000.00
	Attorneys' fees,.....	250.00
Herman Hahlo,.....	Principal.....	2,500.00
	Attorneys' fees,.....	125.00
Herman Hahlo,..... Edward Stieglitz,..... Ernest Werner,..... Julius Ballin, and..... Elias Josseph.....	Principal,.....	2,086.56
	Attorneys' fees.....	104.34

The attorneys' fees in these judgments were confessed under authority conferred by the terms of the notes themselves.

Immediately after the entry of these judgments, executions were issued thereon and delivered to the sheriff of Cook County, in obedience to which he levied upon the stock of merchandise of Heidweyer & Stieglitz, then in their place of business at Chicago. (Rec., 8; Trans., 5.)

A portion of the merchandise was replevied from the sheriff before sale under the said executions, but the remainder was, soon after the levy already mentioned, sold by him for the total sum of $65,537.38. This amount, after payment of the sheriff's fees, was applied and paid upon the executions, as follows (Rec., 9; Trans., 5):

National Bank of Illinois.....	$12,674.00
Siegmund Florsheim.....	25,250.12
Julius Heimann.....	4,695.92
Julius Heimann.....	4,695.92
Philip Florsheim.....	8,454.45
Simon Florsheim.....	4,695.92
	$60,466.33

On the same day on which the foregoing judgments were entered, Heidweyer and Stieglitz assigned certain bills and accounts receivable, amounting in the aggregate to $24,000, to Simon Florsheim, appellee herein, in trust to collect the same

for the benefit of the judgment creditors and of himself, and to return the surplus, if any, to Heidweyer and Stieglitz. (Rec., 10; Trans., 6.)

The original bill in the present suit was filed April 23, 1889, by Englebert Hardt, Marcus L. W. Kitchen and Frederick A. Von Bermuth, partners under the firm name of Hardt, Von Bermuth & Co., appellants herein, in behalf of themselves and all other creditors of Heidweyer & Stieglitz who might come in and contribute to the expense of the suit. (Rec., 2, 3; Trans., 1, 2.) Subsequently, upon the several petitions of the following appellants praying that they be allowed so to come in, orders were entered making them parties complainant in the suit; namely: Richard August Schnabel and Auguste Philippe Montant, composing the firm of Schnabel Brothers (Rec., 22, Trans., 11); E. C. Dillingham (Rec., 32, Trans., 16); and George F. Vietor, Thomas Achelis, Jr., John Achelis and Carl Vietor, composing the firm of Frederick Vietor & Achelis (Rec., 37, Trans., 19). The amounts of the various judgments on which the last named creditors base their claims, and the courts in which and the dates on which they were recovered, are shown by the following table: (Rec., 34, Trans. 18; Rec., 3, Trans., 2; Rec. 25, Trans, 13; Rec., 38, Trans., 20):

E. C. Dillingham, November 16, 1885.	Superior Court of Cook County;	$9,132 26.
Hardt, Von Bermuth & Co., January 21, 1887.	Circuit Court of Cook County.	$10,627 05.
Schnabel Brothers, May 6, 1889.	Circuit Court of Cook County.	$21,720 04.
Frederick Vietor & Achelis, November 11, 1889.	United States Circuit Court, Northern District of Illinois.	$6,704 00.

The original bill and the petitions above mentioned taken together make the following allegations:

Heidweyer & Stieglitz were grossly insolvent as early as January 1, 1884, but by the assistance of friends they were enabled to keep the appearance of doing business until the month of October following. (Rec., 4; Trans., 2.) In September, 1884, they determined definitely that they must fail and go out of business. At that time their indebtedness (Rec., 4; Trans., 3) amounted to about $240,000, and their assets (consisting of merchandise of the value of about $125,000, and bills receivable of the approximate value of $25,000) amounted in all to about $150,000, leaving the excess of liabilities over assets about $90,000. Among their alleged creditors at that time were the persons named above as having obtained judgments by confession, two of whom, Siegmund and Philip Florsheim, were brothers-in-law of the debtors. (Rec., 5; Trans., 3.) Such being their financial condition, it became their duty to make a general assignment under the Illinois law for the benefit of all their creditors, but instead of doing so, and desiring to prefer the creditors above named, they employed legal counsel to devise a means to dispose of all their property to the exclusion of appellants' claims and the claims of other creditors, amounting to about $150,000. (Rec., 5, 6; Trans., 3.) Accordingly they induced the creditors whom they so desired to prefer to place their claims in the hands of Heidweyer & Stieglitz' attorneys in order that the latter might take measures to secure such fraudulent preferences. (Rec., 6; Trans., 3.) These claims were in fact so placed in the atttorneys' hands, and thereupon Heidweyer & Stieglitz, their attorneys and their creditors above named, conspired to fraudulently evade the Illinois assignment law and dispose of all the property of the debtors to the exclusion of all the other creditors. (Rec., 6; Trans., 4.) It was in pursuance of this conspiracy that the judgment notes above mentioned were executed and delivered, that judgments were confessed upon them, (Rec., 7; Trans.,

4), that executions were issued thereupon (Rec., 8; Trans., 5), and that the debtors' merchandise was sold by the sheriff at a great sacrifice of value (Rec., 9; Trans., 5), and the bills and accounts receivable were assigned to Simon Florsheim (Rec., 10; Trans., 6), as above set forth. Out of these various means, therefore, these judgment creditors received the amounts of their judgments and interest and attorneys' fees in full. The entire scheme to prefer these creditors as above described was successfully accomplished, and all the property of Heidweyer & Stieglitz was appropriated by these creditors so preferred to the exclusion of all others. (Rec., 10; Trans., 6.)

The bill further charges that the several judgment notes, judgments, executions, levies, sales, transfers, assignments and other dispositions of all their property made by Heidweyer and Stieglitz on and subsequent to September 16, 1884, were in effect but one instrument and one transaction, and, taken together, constituted a general assignment for the benefit of creditors, in which the preferred creditors are chargeable as assignees and trustees of the property that came to their hands by means of these transactions; that these transactions were entered into and consummated in pursuance of a conspiracy between the parties thereto to defraud the other creditors of Heidweyer & Stieglitz and in fraud of the laws of the State of Illinois; that, while all these transactions constitute an assignment for the benefit of creditors, yet the assignment is fraudulent and void, because the judgment notes were purposely given for sums greater than those due the payees of the notes, respectively, and the provisions in the judgment notes for the payment of attorneys' fees were inserted, and the fees were confessed and collected, with actual intent to hinder, delay and defraud the non-preferred creditors, and have, in fact, defrauded them. (Rec., 11; Trans., 6.)

The bill prays that the defendants may answer, etc.; that

the judgment notes, judgments confessed thereon, executions, levies, and sales thereunder, assignment of bills and accounts receivable, and all transactions had between Heidweyer & Stieglitz and the preferred creditors above referred to, be adjudged to constitute a voluntary assignment for the benefit of creditors with preferences; that the preferences be declared void; that the preferred creditors be held chargeable with, and be decreed to account as trustees and assignees of, all the property that may have come to their hands by reason of any of the transactions described; that such assignees and trustees be removed and a receiver appointed (Rec., 12; Trans., 7), and that if it shall appear that the assignment be not altogether void, the property be distributed ratably among the complainants and all the other creditors, excepting those guilty of the frauds above alleged, etc.; and that subpœna might issue directed to Sigismond Heidweyer, Norbert Stieglitz, National Bank of Illinois, Siegmund Florsheim, Philip Florsheim and Simon Florsheim, and that complainants have other and further relief, etc. (Rec., 13; Trans., 7.)

The defendants being all served with subpœnas (Rec. 17; Trans., 9; Rec., 18; Trans., 10; Rec., 20; Trans., 11), the Florsheims and the National Bank of Illinois appeared (Rec., 21; Trans., 11) and filed a demurrer to the bill (Rec., 28; Trans., 15); whereupon, leave being given, an amendment to the bill and petition of the appellants was duly filed (Rec., 42; Trans., 22), averring, in substance, that immediately after the entry of the judgments in favor of the preferred creditors, appellants caused an investigation to be made as to the genuineness of the indebtedness represented by the judgments; that it was thereupon represented by each of the preferred creditors that their judgments were for full value and were entered for the sole purpose of realizing the moneys due them respectively and without the procurement of the

debtors themselves; that the debtors stated that they had a large amount of property in the form of book accounts and bills receivable, and that they proposed to apply the proceeds thereof to the payment of their other debts (Rec., 43; Trans., 22); that, relying upon these statements, appellants refrained for a considerable time from taking legal means to collect the large indebtedness due them (Rec., 43; Trans., 23) in the belief that the transactions in relation to the confessed judgments were *bona fide*, and having no knowledge of any fact tending to show that they constituted a constructive assignment; that a long time afterward and within a month from the time of beginning this suit, appellants learned for the first time that the confessed judgments covered all the taxable property of Heidweyer & Stieglitz, and that the entry thereof was procured by the latter for the express purpose of preferring certain of their creditors, and that they transferred all their remaining property to a trustee for the benefit of some of their creditors, as was alleged in the original bill; that appellants diligently pursued their ordinary remedies in the law on learning the above mentioned facts respecting the purpose in procuring the judgments by confession, and proceeded at once to reduce their claims to judgment, etc. (Rec., 44; Trans., 23.)

On July 8, 1889, Heidweyer & Stieglitz not having appeared in this suit, an order was entered directing that their default be entered and the bill taken as confessed by them. (Rec., 31; Trans., 16.)

On February 14, 1890, a demurrer to the amended bill was filed on behalf of defendants Florsheim and the National Bank of Illinois. (Rec., 45, 46; Trans., 24.)

On May 5, 1890, a decree was entered sustaining the demurrer generally and directing that the bill be dismissed, from which decree the present appeal was prayed and allowed. (Rec., 48; Trans., 25, 26.)

The questions thus presented to this court are those raised by the demurrer, namely, (1) laches, (2) jurisdiction, and (3) defect of parties, and also the question whether the transactions described in the bill were of such a character as entitled appellants to have them set aside as fraudulent either under the principles of general law or under the statute of Illinois relating to assignments for the benefit of creditors.

Specification of Errors.

(Rec., 53, 54; Trans., 28.)

1st. The Circuit Court erred in sustaining the demurrer.

2d. The Circuit Court erred in dismissing the amended bill.

3d. The Circuit Court erred in not granting the relief prayed for by the amended bill.

4th. The Circuit Court erred in not setting aside the judgment notes, the judgments entered thereon, the executions issued and the levies and sales thereunder, the transfers, assignments and other dispositions of their property made by Heidweyer & Stieglitz, in the bill described, on the ground of fraud.

5th. The Circuit Court erred in not decreeing that the said transactions were entered into and consummated in pursuance of a conspiracy to defraud appellants and the other creditors of Heidweyer & Stieglitz that were not parties thereto.

6th. The Circuit Court erred in not decreeing that the said instruments and transactions were fraudulent and void in that the said judgment notes were purposely given for sums greater than those actually due the payees of said notes respectively at the time they were so given.

7th. The Circuit Court erred in not decreeing that the said instruments and transactions were fraudulent and void in that the provision in said notes for attorneys' fees was inserted with actual intent to hinder, delay and defraud the creditors other than the payees of said notes.

8th. The Circuit Court erred in not decreeing that the said instruments were executed and the said transactions entered into and consummated in fraud of the laws of the State of Illinois.

9th. The Circuit Court erred in not decreeing that the instruments and transactions above mentioned constituted in effect but one instrument and one transaction.

10th. The Circuit Court erred in not decreeing that the said instruments and transactions constituted an assignment for the benefit of creditors.

11th. The Circuit Court erred in not decreeing that the said instruments and transactions were illegal and void under the provisions of the act of the State of Illinois concerning voluntary assignments for the benefit of creditors.

12th. The Circuit Court erred in not decreeing that the provisions made by Heidweyer & Steiglitz for the payment of certain of their creditors and the actual payments to them as in the bill described constituted preferences in said assignment and were therefore void.

13th. The Circuit Court erred in not decreeing that appellees Sigismond, Philip & Simon Florsheim and the National Bank of Illinois were chargeable as assignees or trustees of the property that came to their hands by means of the said instruments and transactions.

14th. The Circuit Court erred in not decreeing that appellee, Simon Florsheim, was chargeable as assignee or trustee of the property that came to his hands by means of the transfer to him of accounts and bills receivable described in the bill.

BRIEF.

I.

NONE OF THE OBJECTIONS RAISED BY THE SPECIAL DEMURRERS WARRANTED THE DISMISSAL OF THE BILL.

1. Appellants were not guilty of laches.

Kilburn v *Sunderland*, 130 U. S., 505, 518.
Meader v *Norton*, 11 Wal., 442, 458.
Michoud v. *Girod*, 4 How., 503, 560.
Sheldon v. *Keokuk Packet Co.*, 8 Fed. R., 769.
Le Gendre v. *Burnes*, 44 N. J. Eq., 372, 378.
Radcliff v. *Rowley*, 2 Barb. Ch., 23, 32.
Waterman v. *Sprague Mfg. Co.*, 55 Conn., 554, 574.

2. The Circuit Court had jurisdiction.

Gorrell v. *Dickson*, 26 Fed. R., 454.
Putnam v. *City of New Albany*, 4 Biss., 365, 368.
Ogilvie v. *Knox Insurance Co.*, 22 How., 380; 2 Black, 539.
Buck v. *Colbath*, 3 Wal., 334, 345.
Shields v. *Thomas*, 18 How., 253.
Barber v. *Barber*, 21 How., 582, 599.

3. There was no defect of parties.

Ogilvie v. *Knox Ins. Co.*, 22 How., 387, 391.
Horn v. *Lockhart*, 17 Wal., 570, 579.
Hotel Co. v. *Wade*, 97 U. S. (7 Otto), 13, 21.

II.

THE BILL WAS IMPROPERLY DISMISSED UNDER THE GENERAL CLAUSE OF THE DEMURRER.

1. The bill shows fraud sufficient to invoke and compel equitable relief.

Pickett v. *Pipkin*, 64 Ala., 520, 526.
Thomas v. *Beck*, 39 Conn., 241.
Preston v. *Spaulding*, 120 Ill., 208.
Farwell v. *Nilsson*, 133 Ill., 45, 50.
Hulse v. *Mershon*, 125 Ill., 52, 56.

2. The several instruments and transactions described in the bill constitute in effect a general assignment with preferences, which is consequently void, as being in contravention of the Illinois statute relating to voluntry assignments.

White v. *Cotzhausen*, 129 U. S., 329, 337, 338, 341, 342.

(1.) The recent construction of that statute by the Supreme Court of Illinois, in *Farwell* v. *Nilsson*, *supra*, is not conclusive, because that case is distinguishable from the suit at bar.

Farwell v. *Cohen*, 138 Ill., 216, 227, 229, 234–238.
Weber v. *Mick*, 131 Ill., 520, 533, 534.
Hanchett v. *Waterbury*, 115 Ill., 220, 224, 228.
Preston v. *Spaulding*, 120 Ill., 208, 216–218.
Home Natl. Bank v. *Sanchez*, 131 Ill., 330, 334.
Hanford Oil Co. v. *First Natl. Bank*, 126 Ill., 584, 598.
Hide and Leather Natl. Bank v. *Rehm*, 126 Ill., 461, 465.
Hanford v. *Prouty*, 133 Ill., 339–355.

(2.) The recent construction placed upon that statute by the Supreme court of Illinois is not the established law of that state.

Farwell v. *Nilsson*, 133 Ill., 45.
Bucher v. *Cheshire R. R. Co.*, 125 U. S., 555, 584.
Scipio v. *Wright*, 101 U. S., 665, 675, 676.
Louisville & Nashville R. R. Co. v. *Palmer*, 109 U. S., 244.
Preston v. *Spaulding*, 120 Ill., 208, 218.
Hide & Leather Natl. Bank v. *Rehm*, 126 Ill., 461, 465.
Gelpke v. *City of Dubuque*, 1 Wall., 175, 205.
Pease v. *Peck*, 18 How., 595, 599.
Farwell v. *Cohen*, 138 Ill., 216, 240, 243.

(3.) Even if this court feel bound to adopt the general construction by the Illinois Supreme Court of the Illinois statute applied to instruments of assignment, they are under no obligation to accept the *inference* that the Illinois court draws as to whether the particular instruments before this court are or are not such "instruments of assignment."

Schroeder v. *Walsh*, 120 Ill., 403.
Farwell v. *Nilsson*, 133 Ill., 49.
Pana v. *Bowler*, 107 U. S., 529, 540.
Swift v. *Tyson*, 16 Pet., 1, 18.
Myrick v. *Michigan Central R. R. Co.*, 107 U. S., 102, 108.

(4.) Though there may be an obligation on the part of this court to follow the construction by a state court of a statute of that state in an action at law, there is no such obligation in a suit in equity.

Bucher v. *Cheshire R. R. Co.*, 125 Ill., 555, 582.

Leffingwell v. *Warren*, 2 Black, 599.
Luther v. *Borden*, 7 How., 1, 40.
Post v. *Supervisors*, 107 U. S., 667.
Johnston v. *Western Union Telegraph Co.*, 33 Fed. Rep., 362.
United States v. *Reid*, 12 How., 361, 363.
Neves v. *Scott*, 13 How., 268, 271.

(5.) The construction of a state statute by a state court may not be invoked in the United States courts to determine rights that have arisen before the state court's decision.

East Alabama R'y. Co. v. *Doe*, 114 U. S. 340, 352.
Farwell v. *Cohen*, 138 Ill., 216, 241.
Buncombe County Commissioners v. *Tommey*, 115 U. S., 122, 127.
Rollins v. *Lake County*, 34 Fed. Rep., 845.
Anderson v. *Santa Anna*, 116 U. S., 356, 361, 365.
Bolles v. *Brimfield*, 120 U. S., 759, 763.
Barnum v. *Okolona*, 148 U. S., 393, 396.
Knox County v. *Ninth Natl. Bank*, 147 U. S., 91, 99.
Clark v. *Bever*, 139 U. S., 96, 116.
Union Trust Co v. *Trumbull*, 137 Ill., 146, 158.

(6.) The weight of authority, as well as principle, is in favor of this court's adopting its own construction of a state statute, notwithstanding a contrary construction by the highest court of that state. This the court has done:

(*a.*) Where there has been no decision by a federal court before that of the state court:

Butz v. *City of Muscatine*, 8 Wall., 575, 582.
Township of Pine Grove v. *Talcott*, 19 Wal., 666, 677.

Pana v. *Bowler*, 107 U. S., 529, 540.
Lane v. *Vick*, 3 How., 464, 476.

(*b.*) Where there has been a decision by one of the United States Circuit Courts before that by the state court.

Burgess v. *Seligman*, 107 U. S., 20, 33.

(*c.*) Where there has been a decision by this court before that of the state court.

Rowan v. *Runnells*, 5 How., 134, 139.
Pease v. *Peck*, 18 How., 595, 598.
Carroll County v. *Smith*, 111 U. S., 556.

As citizens of foreign states appellants are entitled to the independent judgment of the United States Supreme Court.

Watson v. *Tarpley*, 18 How., 517, 520.
Burgess v. *Seligman*, 107 U. S., 20, 34.
Pease v. *Peck*, 18 How., 599.
New Orleans Water Works Co. v. *Southern Brewing Co.*, 36 Fed. R., 833, 835.
Carroll County v. *Smith*, 111 U. S., 556, 563.

ARGUMENT.

I.

THE BILL WAS IMPROPERLY DISMISSED ON THE SPECIAL DEMURRERS.

1. Laches. (*a.*) Appellees allege in the demurrer "that "it appears upon the face of said amended bill" that appellants "have been guilty of inexcusable laches," etc.

We have only to turn to the amended bill itself (Rec., 42; Trans., 22) to find this statement disproved. It is alleged there in detail that appellants made careful investigation, immediately after the entry of the confessed judgments, and were assured by the judgment creditors of the genuineness of their claims, and the *bona fides* of their transactions. Appellants were further lulled into a feeling of security by promises of the debtors that property other than that sold under the confessed judgments and execution thereon, was to be applied in payment of their indebtedness to appellants. Other facts are stated showing that appellants exercised such diligence as prudent business men usually do under like circumstances. (Rec., 43, 44; Trans., 23.)

So far from inexcusable laches appearing "upon the face "of said amended bill," appellants expressly state that they did not learn of the fraudulent character of the judgment notes and subsequent transactions until within a month of a beginning of the suit. (Rec., 43; Trans., 23.)

Where suit is begun within a reasonable time after the discovery of fraud, the defense of laches cannot prevail.

In *Kilbourn* v. *Sunderland*, 130 U. S., 505, the bill was

filed June 9, 1881, and amended March 22, 1882. It charged fraud on the part of real estate agents in transactions extending from 1872 to 1877. One of the defenses was laches, but the lower court nevertheless decreed the relief prayed for. In affirming that decree this court, speaking by the Chief Justice, say, (page 518): "In answer to the defenses of "laches and limitation the complainants contend that the "alleged bad faith of the defendants was not discovered by "them until a short time before the bill was filed, and that "they had no intelligible information of the excess in charges "for care and management until late in June, 1878.

"Reasonable diligence is, of course, essential to invoking "the activity of the court, but what constitutes such diligence "depends upon the facts of the particular case. Where a "party injured by fraud is in ignorance of its existence, the "duty to commence proceedings arises only upon discovery, "and mere submission to an injury after the act inflicting it is "completed, cannot generally, and in the absence of other cir-"cumstances, take away a right of action, unless such acquies-"cence continues for the period limited by the statute for the "enforcement of such right. (*De Bussche* v. *Alt*, 8 Ch. D., "286, 314.) We hold that the complainants moved with suf-"ficient promptness upon discovering the fraud, and that, al-"though reposing confidence in their agents, they may have "neglected availing themselves of some source of knowledge "they might have sought, the defendants cannot be allowed "to say that complainants ought to have suspected them, and "are chargeable with what they might have found out upon "inquiry aroused by such suspicion."

In *Meader* v. *Norton*, 11 Wall., 442, 458, laches and the statute of limitations were set up in argument, but the court say: "Such defenses cannot prevail where the relief sought "is grounded on a charge of secret fraud, and it appears that

"the suit was commenced within a reasonable time after the "evidence of the fraud was discovered.

"We believe no case can be found in the books in which a "court of equity has refused to give relief within the life-time "of either of the parties upon whom the fraud is proved, or "within thirty years after it has been discovered or become "known to the party whose rights are affected by it."

Michoud v. *Girod*, 4 How., 503, 560.

Until, therefore, the allegations of the amended bill are disproved, they furnish a satisfactory explanation of the delay and a perfect defense to the charge of laches.

(*b.*) Even without this explanation, the lapse of four and a half years between Heidweyer & Stieglitz' failure in October, 1884, and the institution of the suit in April, 1889, would not be necessarily fatal. The mere fact of delay is not enough to preclude recovery.

Sheldon v. *Keokuk Packet Co.*, 8 Fed. R., 769.

To urge the defense of laches successfully, it must appear that appellants have gained some unfair advantage over appellees by the delay.

Courts never adopt the course of refusing relief "at the "threshold of the suit, in a case where there is no analogous "statutable bar, unless it is clear, on the face of the bill, that "the complainant has delayed suing for so long a time, after "his cause of action arose, as to deprive the court of the power "of ascertaining with reasonable certainty, what the truth is, "respecting the matter on which he rests his right to a decree, "or that he has by his delay placed himself in a position where "he has gained an unfair advantage over his adversary."

Le Gendre v. *Byrnes*, 44 N. J. Eq., 372, 378.

"Courts of equity do not impute laches by an iron rule; "circumstances are allowed to govern every case. The funda- "mental and only just reason why this plaintiff should be "postponed to a grantee under a fraudulent and avoidable "deed is that the delay of the former, in enforcing his claim "against the property, has induced the latter to subject him- "self to some form of peril of law, or come under some diffi- "culty in protecting his rights, or to assume some burden, let "go some advantage, or part with some right or thing of "value; in short, to be where he would not otherwise have "been."

Waterman v. *Sprague Mfg. Co.*, 55 Conn., 554, 574.

From the pleadings, which constitute our only source of information, it does not appear that the lapse of time between the failure in 1884 and the institution of this suit in 1889 worked any hardship to appellees, the Florsheims and National Bank of Illinois. If the appellants are ultimately successful, these appellees will simply be obliged to surrender the proceeds of the judgment sales. The payment of money is no harder at one time than at another, excepting the small burden that the accumulation of interest imposes, and excepting, in this case, the pain of parting with ill-gotten gains which possession for years has endeared. Appellants can hardly be said to have gained any undue advantage by accepting, in lieu of the ordinary profits of their business on the amounts of their claims against appellees, the small return in the way of interest on those amounts that the law allows.

(*c.*) Laches must appear either affirmatively or by necessary inference.

"A demurrer, therefore, will not lie to a bill, for relief on "the ground of fraud, although it appears that the fraud oc-

"curred more than six years before the commencement of the "suit, unless it also appears positively or by necessary intend- "ment that the fraud was discovered by the party aggrieved "more than six years before he filed his bill for relief. Where "that does not appear, the defendant must be left to make his "defense by plea or answer, so as to present an affirmative "issue upon the question of the discovery of the fraud."

Radcliff v. *Rowley*, 2 Barb. Ch., 23, 32. (Opinion by Chancellor Walworth.)

It need hardly be said that laches on the part of appellants does not appear affirmatively; and we submit to the court that in the light of the allegations of the amended bill, which appellees have by their demurrer admitted, the inference of inexcusable delay, so far from being necessary, becomes impossible.

2. Jurisdiction.

The requirements as to citizenship and amount involved being fulfilled, there would seem to be no possible ground for objection to the jurisdiction of the United States Circuit Court.

If it be appellees' meaning to object to the jurisdiction because three of the judgments on which the present suit is based were recovered in the State courts (Rec., 3, 25, 34, 38; Trans., 2, 13, 18, 20), that objection is easily disposed of by the case of *Gorrell* v. *Dickson*, 26 Fed. R., 454.

In that suit a bill was filed in the United States Circuit Court for the Western District of Pennsylvania to subject a patent right to the payment of the plaintiff's judgment, which had been recovered in a state court. "The "citizenship of the parties and the amount in demand "being such as to give the court jurisdiction, the objection "based on the fact that the judgment was obtained in a state "court, sitting within this judicial district, is without force. "Clearly a creditor's bill between citizens of different states

"will lie in the United States Circuit Court to subject to the "satisfaction of a judgment recovered in a state court, assets "which cannot be reached by process of law."

In *Putnam* v. *City of New Albany*, 4 Biss., 365, 368, the same question was decided in the same way. The court in that case cited favorably *Buck* v. *Colbath*, 3 Wall., 334, where Justice Miller had laid down a kind of rule to determine whether a federal court would have jurisdiction in a case similar to the one at bar. He says: "We must have regard to "the nature of the remedies, the character of the relief sought, "and the identity of the parties in the different suits." Applying this test to the present case we find that the remedy sought in the state court was an action at law, but in this court a bill in chancery to have certain transactions of appellees set aside on the ground of fraud. In the former the character of the relief sought was to exact payment from the bankrupt firm, in the latter it is to compel other parties to pay back what they received from this firm. In the former the parties were not the same as the parties in the latter; none of those of the defendants in this suit who demurred were defendants in the actions in the state Courts. Thus, tried by any portion of the test that the Supreme Court has sanctioned, the Circuit Court had undoubtedly jurisdiction of the suit at bar.

Ogilvie v. *The Knox Insurance Company* was a creditor's bill filed in the United States Circuit Court for the District of Indiana in aid of judgments at law rendered in an Indiana state court. The case was twice in the Supreme Court and twice that court held the bill good.

22 How., 380; 2 Black, 539.

An United States Circuit Court has jurisdiction of a bill filed to enforce a decree of a state court.

Shields v. *Thomas*, 18 How., 253.

Barber v. *Barber*, 21 How., 582, 599.

3. Parties.

Among the creditors in whose favor judgments were confessed were Herman Hahlo and the firm of Hahlo, Stieglitz & Co., who were not made parties defendant to this suit. It is objected by the demurrer that they were "necessary and "proper parties." (Rec., 46; Trans., 24.) The reason for the objection is of course not given, and it certainly does not appear "upon the face of said amended bill."

The only allegations of the bill on this point are that, at the time of the failure of Heidweyer & Stieglitz, they were indebted in certain amounts to Hahlo and Hahlo, Stieglitz & Co., (Rec., 5; Trans., 3), that they executed and delivered to these two creditors judgment notes for these amounts (Rec., 7; Trans., 4), that judgments were thereupon confessed (Rec., 8; Trans., 5), and that, after the application of the proceeds of all the execution sales, there appeared to be still due these two creditors the full amounts of Heidweyer & Stieglitz' indebtedness to them. (Rec., 9; Trans., 5.)

It appears upon the face of the bill, that these two creditors have no possible interest in the present litigation, and there is no reason whatever for making them parties. It can make no difference to appellees whether or not these two creditors are joined with them as defendants. The rights of appellants are the same in either case. If the latter succeed in the suit, appellees Florsheim and the National Bank of Illinois will be decreed to surrender what they received by means of the transaction complained of. But if Hahlo and Hahlo, Stieglitz & Co. were parties, the decree as to appellees would be exactly the same. The suit does not involve any question of contribution.

The purpose of the suit is simply to set aside certain alleged preferences under an alleged assignment as fraudulent. Shall

any of those preferred be suffered to defeat that purpose by objecting that others who were guilty of the same fraud are going free?

Ogilvie v. *The Knox Ins. Co.*, 22 How., 380, 391.

Horn v. *Lockhart*, 17 Wall., 570, 579.

Hotel Co. v. *Wade*, 97 U. S., (7 Otto), 13, 21.

II.

IT WAS ERROR TO DISMISS THE BILL UNDER THE GENERAL CLAUSE OF THE DEMURRER.

1. The bill discloses a flagrant case of fraud, cognizable and remediable under the general principles that govern the actions of a court of equity.

It is not intended to dispute the general proposition that a debtor, even if in failing circumstances, may confess judgment in favor of one of his creditors, provided he has no present intention of discontinuing business and surrendering control of all his property, and when the note on which judgment is confessed has been given for an adequate consideration and in good faith.

But in the present suit none of these elements exist. This is the situation shown by the bill, and, of course, admitted by the appellees. The debtors and those of the creditors who were to be preferred, entered into a conspiracy for the purpose of hindering and defrauding appellants and other unpreferred creditors. To that end they even employed the ingenuity of counsel. For eight months previous they had been grossly insolvent. (Rec., 4, Trans., 2.)

At the time the notes were given they knew definitely that they could no longer continue in business. They knew

that by the very execution of these notes and assignment of their bills receivable they were surrendering control of their entire property. Then, too, the considerations for the notes were inadequate. (Rec., 5, Trans., 3.) Their amounts were greatly in excess of the amounts actually due the holders.

Four of the creditors to whom the notes were given were brothers-in-law of the debtors. (Rec., 5, Trans., 3.)

The fact that a debtor's entire estate was conveyed to his *near relative* for an *inadequate consideration* was held to be a badge of fraud.

Pickett v. *Pipkin*, 64 Alabama, 520–526.
Thomas v. *Beck*, 39 Conn., 241.

It further appears as a fact that the provisions in the notes for attorneys' fees (aggregating $3,564) were inserted with actual intent to hinder and delay the creditors. (Rec., 11; Trans., 6.)

In a case arising in the same state in which these transactions occurred a bill was filed to reach the amount of attorneys' fees included in certain judgments by confession. In sustaining the bill and decreeing the repayment of such fees, the Illinois Supreme Court say: "* * * A gift or voluntary conveyance by an insolvent debtor is presumptive evidence of fraud. When a man voluntarily and without consideration puts his property out of his hands, being at the time in debt, his act in so doing is, as to pre-existing creditors, fraudulent and void. He [the debtor] had no right to give them [his preferred creditors] $1,258 [the amount of attorneys' fees] out of his assets when he was insolvent, and thereby prevent other creditors, equally meritorious, from realizing that much towards the payment of their debts."

Hulse v. *Merskon*, 125 Ill., 52, 56.

The point to be noticed is that all the authorities in the books that sanction the preference of certain creditors by means of confessing judgments, etc., are expressly conditioned on the *bona fides* of the transation. (*Preston* v. *Spaulding*, 120 Ill., 208; *Farwell* v. *Nilsson*, 133 Ill., 51.) But in the case at bar, the debtors' transactions from beginning to end were stamped with *mala fides*. What better reason could there be for the interposition of a court of equity? On the ground of fraud alone the Circuit Court ought to have set the judgments and sales aside and to have decreed the relief prayed for.

2. The transactions set forth in the bill were illegal and void under the act of the General Assembly of Illinois, in force July 1, 1877, concerning voluntary assignments for the benefit of creditors. (Ill. Sess. Laws of 1877, 116; 1 Starr & Curtis' Annotated Stats. Ill., 1303.)

The provisions of that act are in part as follows:

"That in all cases of voluntary assignments hereafter made "for the benefit of creditor or creditors, the debtor or debt- "ors shall annex to such assignment an inventory under oath "or affirmation of his, her or their estate, real and personal, "according to the best of his, her or their knowledge; and "also a list of his, her or their creditors, their residence and "place of business, if known, and the amount of their respect- "ive demands; but such inventory shall not be conclusive as "to the amount of the debtor's estate, but such assignment "shall vest in the assignee or assignees the title to any other "property, not exempt by law, belonging to the debtor or "debtors at the time of making the assignment and compre- "hended within the general terms of the same. Every assign- "ment shall be duly acknowledged and recorded in the county "where the person or persons making the same reside, or "where the business in respect of which the same is made

"has been carried on; and in case such assignment shall em-
"brace lands or any interest therein, then the same shall be
"recorded in the county or counties in which said land may
"be situated." (Sec. 1.)

"That at the first term of the said county court after the
"expiration of the three months, as aforesaid, should no excep-
"tion be made to the claim of any creditor, or if exceptions
"have been made and the same have been adjudicated and
"settled by the court, the said court shall order the assignee
"or assignees to make from time to time fair and equal divi-
"dends (among the creditors) of the assets in his or their
"hands, in proportion to their claims." (Sec. 6.)

"That no assignment shall be declared fraudulent or void
"for want of any list or inventory as provided in the first sec-
"tion of this act." (Sec. 8.)

"Every provision in every assignment hereafter made in
"this state, providing for the payment of one debt or liability
"in preference to another, shall be void, and all debts and lia-
"bilities within the provisions of the assignment shall be paid
"*pro rata* from the assets thereof." (Sec. 13.)

The construction of this statute was before this court in the case of *White* v. *Cotzhausen*, 129 U. S., 329. It was there held (page 342) that "when an insolvent debtor recognizes
"the fact that he can no longer go on in business, and deter-
"mines to yield the dominion of his entire estate, and in exe-
"cution of that purpose, or with an intent to evade the statute,
"transfers all, or substantially all, his property to a part of his
"creditors, in order to provide for them in preference to other
"creditors, the instrument or instruments by which such trans-
"fers are made and that result is reached, whatever their
"form, will be held to operate as an assignment, the benefit
"of which may be claimed by any creditor not so preferred
"who will take appropriate steps in a court of equity to en-
"force the equality contemplated by the statute."

In *White* v. *Cotzhausen* the debtor executed and delivered two deeds, a bill of sale and a judgment note to certain of his creditors, and judgment was confessed on the note. In the present case the debtors executed and delivered four judgment notes, and assigned in trust certain bills and accounts receivable, to those of their creditors who are appellees herein, and judgment was entered on the notes. In both cases, the debtors were completely stripped of all their property. The variation of the forms of the transfers in the two cases is not material, for the court expressly say, "the instruments by "which such transfers are made will be held to operate as an "assignment" "*whatever their form.*"

The two cases are substantially parallel and accordingly the equitable principle above enunciated is confidently invoked in application to the case at bar.

It is not doing violence to the language of Mr. Justice HARLAN to paraphrase it by simply substituting the names of the parties in this suit for those in the former one (page 341):

"If then we avoid over-strict construction, and regard sub-"stance rather than form; if effect be given to this legislation, "against mere devices that will defeat the object of its enact-"ment, the several writings executed by [Heidweyer & Stieg-"litz], all about the same time, to [the appellees Florsheim "and the National Bank of Illinois,] whereby, in contemplation "of [their] bankruptcy, and according to a plan previously "formed [they] surrendered [their] entire estate for [the] "benefit [of said appellees] to the exclusion of all other cred-"itors, must be deemed a single instrument, expressing the "purposes of the parties in consummating one transaction, and "operating as an assignment or transfer under which the "[appellants] may claim equality of right with the creditors so "preferred."

Counsel for appellees will perhaps seek to break the force

of the application of the *White* v. *Cotzhausen* doctrine to the suit at bar and of the unavoidably resulting reversal of the decree appealed from, by bringing to this court's attention the case of *Farwell* v. *Nilsson*, 133 Ill., 45, in which the construction of the same statute of Illinois was before the Supreme Court of that state, and in which that court reached a conclusion in apparent conflict with the opinion in *White* v. *Cotzhausen;* and will press upon the attention of this court their well-known practice, when called upon to interpret a statute of one of the states, to be guided by the construction placed upon that statute by the highest court of the state. In anticipation of such an attempt, we beg, while of course recognizing this court's adherence to the above general rule of construction, to submit the following considerations to show why the doctrine of *Farwell* v. *Nilsson*, is inapplicable to the case at bar.

(1.) In the first place the Illinois case is not an authority in this suit, for the reason that the two cases are clearly distinguishable. The analogy between them fails at a material point. In *Farwell* v. *Nilsson* the debtors executed a series of judgment notes on which judgments were confessed and executions issued and levied, as in the case at bar. The Illinois Supreme Court held that the transfer of the debtors' property thus effected was not, technically, an "assignment" within the meaning of the statute. In the present suit the debtors not only took the same steps, but made a voluntary assignment in addition. The subject of the assignment was certain bills and accounts receivable. The property so assigned was of no inconsiderable value, aggregating $24,000. (Rec., 10; Trans., 5, 6.) The assignee was appellee, Simon Florsheim, who took these assets in trust to collect the same for the benefit of the judgment creditors and of himself and to return the surplus, if any, to the assignors.

This tallies at all points with the Illinois Supreme Court's

definition of an assignment for the benefit of creditors: "A "transfer, without compulsion of law, by a debtor of his prop- "erty to an assignee in trust, to apply the same, or the pro- "ceeds thereof, to the payment of his debts, and to return the "surplus, if any, to the debtor."

Farwell v. *Cohen*, 138 Ill., 216, 227.
Weber v. *Mick*, 131 Ill., 520, 533.

In order that the statute should apply it is not necessary that the assignment should include the whole property of the debtor. The act is put into operation as well by a partial assignment as by a general one.

Weber v. *Mick*, 131 Ill., 534.
Farwell v. *Cohen*, 138 Ill., 234-238.

Whatever estate passes to the assignee must be administered in conformity with the provisions of the statute and distributed ratably among the creditors.

Hanchett v. *Waterbury*, 115 Ill., 220, 224, 228.

But the Illinois Supreme Court, in construing the Assignment Act, have repeatedly held that when a debtor has reached the point where he is ready and determined to yield the dominion of his property, all transfers or dispositions of his property made at the same time with and in contemplation of the assignment proper, whereby a preference is in fact given, come within the inhibition as to preferences.

Preston v. *Spaulding*, 120 Ill., 208, 216, 217, 218.
Home National Bank of Chicago v. *Sanchez*, 131 Ill., 330, 334.
Hanford Oil Co. v. *First Natl. Bank*, 126 Ill., 584, 598.
Hide & Leather Natl. Bank v. *Rehm*, 126 Ill., 461, 465.
Hanford v. *Prouty*, 133 Ill., 339, 355.

Heidweyer & Stieglitz had reached the point of insolvency thus described. (Rec., 4; Trans., 2.) The judgment notes were executed, some of them less than a month before, and one of them two days before, the assignment proper was made. (Rec., 7; Trans., 6.) The judgments were entered on the very day of the assignment. (Rec., 7; Trans., 1; Rec., 10; Trans., 5, 6.)

The fact that the assignment was made to Simon Florsheim, one of the creditors, does not militate against the contention that the transfer was an assignment within the purview of the statute. Speaking of the instrument under consideration in that case, the Illinois Supreme Court, in *Farwell* v. *Cohen*, 138 Ill., 229, say: "In express terms it created a trust in favor of certain credi- "tors of Silverman other than Cohen [the assignee]. The "fact that a debt due Cohen was also provided for did not "take from the instrument the character of an assignment for "the benefit of the creditors."

The conclusion is inevitable that Heidweyer & Stieglitz made such an assignment as was sufficient to put the statute into operation; that this assignment must be held to have drawn to it all the notes, judgments, executions, levies and sales, and that they must be treated as though incorporated into the assignment itself. They were all parts of one general assignment.

It results, therefore, that the suit at bar is in the same class of cases with *Preston* v. *Spaulding*, *supra*, and the others cited with it. The doctrine applicable is not that of *Farwell* v. *Nilsson*, but *Preston* v. *Spaulding*, and the Circuit Court clearly erred in not applying the latter doctrine, commended and adopted in *White* v. *Cotzhausen*, and in not granting the relief prayed for.

(2.) Even if the facts in *Farwell* v. *Nilsson* were so closely

analogous that if this suit were pending in the Illinois courts, that decision would be conclusive of it, yet it would not follow that the Supreme Court of the United States would be likewise concluded.

This court has never considered itself bound by the decision of a state court, even in construing a statute of its own state, except where that decision has become the *established* law of the state.

In *Bucher* v. *Cheshire Railroad Co.*, 125 U. S., 555, 584, the court, while adopting the construction that the courts of Massachusetts had given one of the statutes of that state, lay special emphasis on the fact that "the decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule."

In *Scipio* v. *Wright*, 101 U. S., 665, 675, 676, this court in following the construction by the New York courts of a statute of that state, say: "The highest court of New York has repeatedly construed it," and add significantly, "It thus appears to be the settled construction given by the courts of New York to the act."

The court, in *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S., 244, say: "We are not necessarily governed by previous decisions of the state courts * * * except where they have been so firmly established as to constitute a rule of property."

Now the fact in regard to the present case is that the *Farwell* v. *Nilsson* decision was rendered at the March term, 1890. This decision can hardly be said, therefore, to be "of sufficiently long standing to establish the rule" therein enunciated. Neither are decisions to this effect "numerous enough" for that purpose. It cannot be said that the Supreme Court of Illinois has "repeatedly construed" the voluntary assign-

ment act. So far from the decision in *Farwell* v. *Nilsson* being the "settled construction of the Supreme Court of "Illinois," we submit that there is authority emanating from the same source that is directly in conflict with it.

In *Preston* v. *Spaulding*, 120 Ill., 208, 218, construing the same Assignment Act, the court say:

"We hold that it is within the spirit and intent of the statute "that when the debtor has formed a determination to volun- "tarily dispose of his whole estate, and has entered upon that "determination, it is immaterial into how many parts the per- "formance or execution of his determination may be broken,— "the law will regard all his acts having for their object and "effect the disposition of his estate as parts of a single transac- "tion."

And in another case, after reciting that the debtor "had "abandoned all hope of extricating himself from his financial "embarrassments, or of continuing longer in business, and was "busied solely with a consideration of the disposition to be "made of his assets, in view of the impending and inevitable "catastrophe," the Illinois Supreme Court say: "So long as he "is clearly shown to have entered upon the disposition of his "property for the benefit of his creditors at the time he made "the judgment notes, the law will indulge in no refinements in "order to fix the precise point of time at which he reached the "determination to make a general assignment."

Hide and Leather National Bank v *Rehm*, 126 Ill., 461, 465.

The United States Supreme Court, in *White* v. *Cotzhausen*, have simply taken the Illinois Supreme Court at their word and applied the latter's own doctrine to the facts in that case. They quote at length the opinion of the Illinois court, and have followed whither that court led. *White* v. *Cotzhausen* is

clearly the logical consequence of *Preston* v. *Spaulding*. The state tribunal, as we confidently submit, has shifted its position from the broad ground on which the latter case rests. In no sense of the words can the law of Illinois on the question be considered "established" or "settled." This court are therefore at liberty to adhere to their own construction. But if they should be disposed to be guided in the decision of the case at bar by the state court's adjudications, they would be confronted by a choice between two conflicting authorities. One of these this court have already followed in *White* v. *Cotzhausen*. In the present suit, which involves the same question, shall they not follow the same guide, rather than shift their position, too, in the attempt to keep pace with the vacillation of the state court?

The attitude of this court upon this point is very clearly defined in the following language in *Pease* v. *Peck*, 18 How., 595, 599: "When the decisions of the state court are not "consistent, we do not feel bound to follow the last if it is contrary to our own convictions, and much more is this the "case where, after a long course of consistent decisions, some "new light suddenly springs up, or an excited public opinion "has elicited new doctrines subversive of former safe precedent. Cases may exist also, when a cause is got up in a "state court for the very purpose of anticipating our decision "of a question known to be pending in this court. Nor do "we feel bound in any case in which a point is first raised in "the courts of the United States, and has been decided in a "Circuit Court, to reverse that decision, contrary to our own "convictions, in order to conform to a state decision made in "the meantime. Such decisions have not the character of "*established precedent declarative of the settled law of a state.*"

"It cannot be expected that this court will follow every

"such oscillation, from whatever cause arising, that may pos-
"sibly occur."

Gelpke v. *City of Dubuque*, 1 Wal., 175, 205.

It may be noted in passing, that the Illinois Supreme Court would seem to have recently afforded a warrant for the liberal construction of the Assignment Act adopted in *White* v. *Cotzhausen* by the following language from their opinion in *Farwell* v. *Cohen*, 138 Ill., 210, 240, 243, rendered since the decision in *Farwell* v. *Nilsson*:

"The act, as we have frequently held, is remedial, and should
"be liberally construed, and so as to remedy the evils intended
"to be cured and advance the remedy. No matter what they
"call the instrument, the law makes it a voluntary assign-
"ment. Nor is it a matter of any moment that they supposed
"it was an instrument for the benefit of a few chosen creditors,
"for the statute enlarged the trust and made it enure to the
"benefit of all the creditors."

(3) But, even if it could be established that the *Farwell* v. *Nilsson* case was analogous to the present case, and that that decision was binding upon this court, it would not necessarily result that the transfers described in the bill in this suit did not constitute an assignment under the Illinois statute.

This Illinois decision furnishes an answer to the inquiry: What is an *assignment* within the meaning of the Illinois statute? The whole difference between this court and the Illinois tribunal in the construction of the statute turns upon that single word. In an earlier case (*Schroeder* v. *Walsh*, 120 Ill., 403, 412), the Illinois court had attributed to the word a broad, comprehensive meaning, holding that the act applied to "conveyances" generally.

It was this reasonable and liberal construction of the word that this court seem to have adopted in *White* v. *Cotzhausen*.

They there treat an assignment as the act of assigning; a conveyance; a transfer. But the Illinois court in *Furwell* v. *Wilson*, *supra*, have circumscribed and hedged in their own definition until they put the evidence of the assignment in place of the assignment itself. They seem to have read into the statute the words "deed of" before the word "assignment." They say (page 49) that the statute can be put into operation only by "the execution of an instrument," and that the form of the instrument is immaterial. This is the sum and substance of the decision. Whatever the court decided beyond that was an inference or deduction from the general doctrine applied to the particular facts of that case. In point of fact they did decide that certain judgment notes in suit, when measured on the Procrustean bed of their own definition, did not exactly fit. The notes, they said, were not instruments of assignment.

Now, granting for the moment that the general construction of the Illinois court, (that the statute is inoperative unless the debtor shall have made an assignment in writing), is binding upon this court, are the latter to be equally bound by any inference that the Illinois court may draw as to what instruments in particular cases are or are not sufficient for the purpose of their construction?

Pana v. *Bowler* (107 U. S., 529, 540) is in point. Bonds of a railway company had been issued in pursuance of a town election. The question presented was the validity of the election and consequently of the bonds. The highest court of the state had declared the latter void. The following is the language of this court:

"It is insisted that this court is bound to follow the decision "of the Supreme Court of Illinois and hold the bonds in ques- "tion void. We do not so understand our duty. Where the "construction of a state constitution or law has become set- "tled by the decision of the state courts, the courts of the

"United States will, as a general rule, accept it as evidence of "what the local law is. Thus we may be required to yield "against our own judgment to the proposition that under the "charter of the railway company, the election in this case, "which was held under the supervision of a moderator chosen "by the electors present, was irregular, and, therefore void. "But we are not bound to accept the *inference*, drawn by the "Supreme Court of Illinois, that in consequence of such irregu- "larity in the election the bonds issued in pursuance of it by "the officers of the township, which recite on their face that "the election was held in accordance with the statue, are void "in the hands of *bona fide* holders. This proposition is one "which falls among the general principles and doctrines of "commercial jurisprudence, upon which it is our duty to form "an independent judgment, and in respect of which we are "under no obligation to follow implicitly the conclusions of any "other court however learned or able it may be."

Now the Illinois court insist upon a written instrument. Unless, therefore, a judgment note is not a written instrument, that requirement is complied with in the case at bar. But there remains the further question, whether or not such an instrument or a series of such instruments is in effect an instrument of assignment, however informal and inartificial. It would seem to be a very narrow construction that would require a negative answer to this question. There is no doubt that the actual transfer of a debtor's property can be effected as completely by means of judgment notes as by the most formal of assignment deeds. But, however answered, we submit that the question "is one which falls within the general principles and "doctrines of commercial jurisprudence," and which this court are free to decide for themselves, untrammeled by any inferences on the part of the Illinois court.

In *Swift* v. *Tyson*, 16 Pet., 1, in commenting on the thirty-

fourth section of the Judiciary Act which requires that the laws of the several states shall be regarded as rules of decisions in the United States courts, this court say (page 18):

"It never has been supposed by us that this section did ap-"ply, or was intended to apply, to questions of a more general "nature, not at all dependent upon local statutes or local usages "of a fixed and permanent operation; as, for example, to the "construction of ordinary contracts or other written instru-"ments, and especially to questions of general commercial law "where the state tribunals are called upon to perform the like "function as ourselves; that is, to ascertain upon general rea-"soning and legal analogies what is the true exposition of the "contract or instrument or what is the just rule furnished by "the principles of commercial law to govern the case."

The question whether a judgment note may become an instrument of assignment does not belong peculiarly to the assignment statute of Illinois,—"it is not at all dependent upon local "statutes." Here is a series of "ordinary contracts," of "writ-"ten instruments," the construction and true "exposition" of which become the function of this court, unassisted by any other tribunal whatever.

On another occasion there was raised in this court the question whether or not a bill of lading, issued by a railroad company, whereby the company agreed to carry cattle beyond its own line to a place named for final delivery, was a "through "contract." The bill of lading was issued in Illinois and the rulings of the Supreme Court of that state, as to the effect of such an instrument, were claimed to be conclusive; but this court declined to follow them, and in the exercise of its own judgment placed a different construction upon the contract.

Myrick v. *Michigan Central Railroad Co.*, 107 U. S., 102, 108.

There appears no good reason why this court are not as much at liberty to determine for themselves when a judgment note becomes an instrument of assignment as to decide when a bill of lading becomes a through contract.

Whether or not the construction of the Illinois statute belongs exclusively to the Illinois court, the construction of the written instruments in the case at bar belongs exclusively to this court.

(4.) Hitherto, in endeavoring to anticipate appellees' attempt to force the case of *Farwell* v. *Nilsson* upon the attention of this court as a guide, and in considering how far the federal courts are bound by the adjudications of state tribunals, we have proceeded as if there were no distinction in this regard between actions at law and suits in equity. But the following considerations will show that there is, in fact, a vital distinction.

The case which, perhaps, seems to go farthest in the direction of requiring federal courts to adopt the state courts' construction is the recent case of *Bucher* v. *Cheshire Railroad Co.*, 125 U. S., 555. This was an action at law in the United States Circuit Court of Massachusetts against a railway company for damages for personal injuries. The defense was that plaintiff could not recover because he was, at the time of the accident, violating a state statute against Sunday-traveling. The Supreme Court of Massachusetts, in a number of similar cases, had held this a proper defense. In the case above cited the question, therefore, arose how far this court was bound to follow the decisions of the Massachusetts court on that subject. Mr. Justice MILLER, who delivered the opinion, begins the discussion of that question by quoting that section of the Judiciary Act of September 24, 1789 (C. 20, Sec. 34, 1 Stat., 92), which reads as follows: "The laws of the several states, "except where the constitution, treaties or statutes of the "United States otherwise require or provide, shall be regarded

"as rules of decision in trials at common law, in the courts of "the United States, in cases where they apply." Rev. Stat., Sec. 721. The learned justice proceeds (page 582): "It "has been held by this court that the decisions of the highest "court of a state in regard to the validity or meaning of the "constitution of that state or its statutes are to be considered "as the law of that state within the requirement of this sec- "tion." Then immediately follows a quotation from the opinion in *Leffingwell* v. *Warren* (2 Black, 599), to show that "the "construction given to a statute of a state by the highest tri- "bunal of such state * * * is as binding upon the courts "of the United States as the text." *Luther* v. *Borden*, 7 How., 1, 40, and *Post* v. *Supervisors*, 107 U. S., 667, were also cited in support of the same doctrine. The court finally reached the conclusion that the construction of the statute in question by the Massachusetts courts had established "a local law of "that state," which this court were bound to follow.

The significant fact to be noted is that this decision is based wholly on the section of the Judiciary Act first quoted in the opinion. And not only that case, but the others cited in the opinion—the leading cases on this subject—all derive their force and authority, in the understanding of this court, from the same source, namely, the section above quoted. But that section expressly, and as clearly as words can accomplish it, confines its provision to "trials at common law." Now, as the suit at bar happens to have been brought in chancery, no argument is needed to show that this section is totally inapplicable. It necessarily follows that *Bucher* v. *Cheshire Railroad Co.*, and the other cases therein quoted, (which, it may be mentioned, were all actions at law), fail equally to apply.

Justice MILLER seems to have feared that counsel might thereafter be tempted to stretch this case beyond its proper

province, for we find him saying: "The language of the "statute limits its application to cases of trial at common law. "There is, therefore, nothing in the section which requires it to "be applied to proceedings in equity or in admiralty."

The learned judge that delivered the opinion in *Johnston* v. *Western Union Telegraph Co.*, 33 Fed. R. 362, evidently had this distinction in mind. He says (page 364): "It is true "that the positive local statutes and the decisions construing "them, in a state where a federal court has jurisdiction, form a "rule by which it is governed in civil *actions at common law*, "where such actions do not arise under the laws of the United "States."

In *United States* v. *Reid*, 12 How., 361, 363, Chief Justice TANEY says: "The language of this section [§ 34 of "Judiciary Act of 1789] can not, upon any fair construction, "be extended beyond civil cases at common law, as contradis- "tinguished from suits in equity."

See also *Neves* v. *Scott*, 13 How., 268, 271.

It results, therefore, that, however restricted this court may be in the construction of state statues in actions at law, in the present suit, being one in equity, they are absolutely at liberty to follow their own judgment, wheresoever it may lead.

(5.) Again, granting for the sake of argument that an analogy between *Farwell* v. *Nilsson* and the suit at bar is traceable, still, if this court should be of the opinion that the rights of appellants are such as would entitle them to relief but for that decision, the prayer of their bill ought certainly to have been granted. For those rights accrued long before that decision was rendered, and the latter in consequence is totally inapplicable. Decisions can have no retroactive effect upon transactions that may have been entered upon or rights that may have accrued previously to the rendition of those decisions.

In *East Alabama Railway Co.* v. *Doe*, 114 U. S., 340, 352, the court say:

"We are not referred to any decision of the Supreme Court "of Alabama made before the rights in this suit arose or be- "fore the suit was brought, determining the questions here in- "volved. Two unreported cases are cited by the defendants "in error. * * * To these cases, if they were in point, "the doctrine always held by this court, and so emphatically "repeated in *Burgess* v. *Seligman*, 107 U. S., 20, would be "applicable, namely, that the courts of the United States, in "the administration of state laws in cases between citizens of "different states, 'have an independent jurisdiction co-ordinate "'with and not sub-ordinate to that of the state courts, and are "'bound to exercise their own judgment as to the meaning and "'effect of those laws,' and that when contracts and transac- "tions have been entered into and rights have accrued thereon, "in the absence of any authoritative decision by the state "courts, the courts of the United States 'properly claim the "'right to adopt their own interpretation applicable to the "'case, although a different interpretation may be adopted by "'the state courts after such rights have accrued.'"

In the present suit the transactions described in the bill were entered into and completed during the year 1884. Appellants thereupon acquired the right to have these transactions set aside on the ground of fraud, and to have the debtors' assets distributed *pro rata*, although, as above explained, they were then in ignorance of the fraud out of which those rights grew. ("All the creditors of the assignor are interested in "the matter of the assignment and have a *legal right* to re- "ceive their proportionate share of the assets." *Farwell* v. *Cohen*, 138 Ill., 216, 241.) Suit was begun in April, 1889. But the decision in *Farwell* v. *Nilsson* was not rendered till the March term, 1890. The "doctrine always held by this

"court" is therefore clearly applicable to the case at bar, and there can be no doubt of their "right to adopt their own inter-"pretation" of the Illinois assignment law.

In *Buncombe County Commissioners* v. *Tommey*, 115 U. S., 122, the court were called upon to interpret a mechanics' lien law of North Carolina. A decision of the Supreme Court of that state, in which the same law had been under discussion, was cited as an authority binding upon the court. This court proceed to set forth the grounds of their interpretation, after prefacing their remarks with this reference to the state court's decision (page 127): "But, without accepting as conclusive "an opinion delivered after the rights of the parties had be-"come fixed."

Mr. Justice BREWER, while sitting as a circuit judge, said:

"While the federal courts are in a certain sense independ-"ent tribunals, yet they sit within the state to construe and en-"force its laws. Whenever a construction has been placed "upon a state statute or consitution by her supreme court, "that determines for both state and federal courts all questions "and rights arising after such construction; but when the rights "or *claims of right* arose prior to such construction, then the "duty rests upon the federal courts of independent examin-"ation and determination."

Rollins v. *Lake County*, 34 Fed. R., 845.

The decision in *Anderson* v. *Santa Anna*, 116 U. S., 356, turned upon the validity of certain laws of the State of Illinois authorizing the issue of municipal bonds. Up to the date of the issue the Supreme Court of that state had held these laws valid, but subsequently adopted a contrary construction. This court, speaking by Mr. Justice HARLAN, say (page 361):

"If, according to the law of Illinois, as declared by its "highest court at the time the bonds in suit were issued, the

"act of February 28, 1867, was a valid exercise of legislative "power, the rights of the purchasers or holders could not be "affected merely by subsequent change of decision. * * * "If, however, we are in error in our interpretations of the de- "cisions in [the Illinois cases decided before the issue of the "bonds in suit], it results that when the bonds were executed "there was no decision of the state court in reference to the "power of the legislature to enact the statute of February 28, "1867. In that case, the duty of this court is to determine "upon its independent judgment what was the law of Illinois "when the rights of the parties accrued."

Applying this line of argument to the present case, we maintain that if the broad construction put upon the Illinois Assignment Act in *Preston* v. *Spaulding*, *supra*, (of which, as we have pointed out, *White* v. *Cotzhausen* is the logical consequence,) is the correct one, then these appellants are entitled to the relief they seek. But even if we are in error in our interpretation of that decision, it results that at the time that appellants' rights accrued there was no decision of the state court to govern such a case as the one at bar. In that event, "the duty of "this court," to use the language above quoted, "is to deter- "mine upon its independent judgment what was the law of "Illinois when the rights of" appellants accrued.

Continuing, the court in *Anderson* v. *Santa Anna*, say (page 365):

"While the courts of the United States accept and apply "the construction of a state constitution, or of a local statute, "upon which the rights of parties depend, which has been "fixed by the course of decisions in the state court, it is the "settled doctrine of this court that rights accruing under one "construction will not be lost merely by a change of opinion "in the state court; and where such rights have accrued, be-

"fore the state court has announced its construction, the fed-
"eral courts, although leaning to an agreement with the state
"courts, must determine the question upon their own inde-
"pendent judgment."

In *Bolles* v. *Brimfield*, 120 U. S., 759, 763, the same question as that in *Anderson* v. *Santa Anna* was presented. The court say:

"In respect to rights arising under, and depending upon the
"interpretation of, the constitution and laws of a state, this
"and other courts of the United States will accept as con-
"trolling the established doctrines of the highest court of the
"state, as *announced before such rights accrue*. * * *"

In another case, arising in Mississippi, in which the question of the validity of county bonds was again before this court, Mr Justice SHIRAS says:

"As against a party who became the owner of such bonds
"before the decision of the Supreme Court of the state was
"rendered, which was the case here, we do not consider our-
"selves bound by such decision unless we regard it as intrin-
"sically sound."

Barnum v. *Okolona*, 148 U. S., 393, 396.

To the same effect is

Knox County v. *Ninth National Bank*, 147 U. S., 91, 99.

In another case the question before this court was the construction of a statute of Iowa relating to stock liability. "It
"is, however, contended that the judgment cannot be sustained
"without disregarding later decisions of the Supreme Court
"of Iowa, which, it is insisted, rest upon the statute of that
"state and are binding upon this court. * * * All the
"cases in the learned court to which attention has been called

" were determined after Greene acquired the stock in question, " and all, with one exception, after this litigation was com- " menced. The recognition in the Iowa statute of the right " of creditors of corporations to look to unpaid installments of " stock subscription to obtain satisfaction of their demands " did not confer a new right, but is a recognition of a right " existing before the statute. * * *" The court declined to accept the Iowa decisions as controlling.

Clark v. *Bever*, 139 U. S., 96, 116.

The analogy between the case just quoted and the one at bar appears more clearly when we remember that the Illinois case, to which counsel for appellees will probably call attention as militating against the application of the *White* v. *Cotzhausen* doctrine to the case at bar, was determined after appellants acquired the right to have that doctrine so applied, and that that case was determined after this litigation was commenced. The recognition in the Illinois statute of the right of a debtor to make an assignment for the benefit of creditors did not confer a new right, but is a recognition of a right existing before the statute.

" It will be observed that the statute in relation to voluntary " assignments for the benefit of creditors does not assume to " create a right, but that it merely assumes to modify and reg- " ulate an existing right."

Union Trust Co. v. *Trumbull*, 137 Ill., 146, 158.

(6.) Finally, the decision in *Farwell* v. *Nilsson*, even if in point, would not be conclusive upon this court, for both principle and authority are in favor (*a*) of this court's exercising judgment independent of a state court's construction of a statute of that state, even when there has been no decision of a federal court, antedating the state court's decision, to give direction to this court's decision; (*b*) the reason and au-

thority for such independence become stronger when a decision by one of the United States Circuit Courts has been rendered before that of the state court, and, (*c*) strongest of all, when, as in the case at bar, this court itself have themselves construed the statute in question before the state court's decision on the same point.

(*a*) Even in cases where, no previous adjudication having been had upon the same point in the federal courts, there was nothing to give direction to the decision of this court but the decisions of the state tribunals, this court have repeatedly refused to follow in that direction.

In *Butz* v. *City of Muscatine*, 8 Wall., 575, 582, this court had under consideration the provisions of the code and charter of that city, which had previously been construed by the Supreme Court of Iowa. This court say: "There are several "adjudications of the highest court of the state more or less "adverse to the views we have expressed. We do not deem "it necessary more particularly to advert to them. Entertain- "ing the highest respect for those by whom they were made, "we have yet been unable to concur in the conclusions which "they announce. It is alike the duty of that court and of this "to decide the questions involved in this class of cases, as in "all others, when presented for decision. This duty carries "with it investigation, reflection, and the exercise of judgment. "It cannot be performed on our part by blindly following in "the footsteps of others and substituting their judgment for "our own.

"Were we to accept such a solution we should abdicate the "performance of a solemn duty, betray a sacred trust com- "mitted to our charge, and defeat the wise and provident "policy of the constitution which called this court into exist- "ence. * * *"

This court, in *Township of Pine Grove* v. *Talcott*, 19 Wall.,

666, 677, decided that a statute of the State of Michigan was valid, although the Supreme Court of that state had previously declared it invalid. The following language was used: "It "is insisted that the invalidity of the statute has been deter- "mined by two judgments of the Supreme Court of Michigan, "and that we are bound to follow these adjudications. We "have examined these cases with care. With all respect for "the eminent tribunal by which the judgments were pro- "nounced, we must be permitted to say that they are not sat- "isfactory to our minds."

So also, in *Lane* v. *Vick*, 3 How., 464, 476, and *Pana* v. *Bowler*, 107 U. S., 529, 540, this court declined to follow decisions of two state supreme courts construing a certain last will and a state statute respectively, although there was no federal construction, previous to the state decisions, to guide them to their conclusions.

(*b*) *A fortiori*, where a federal court is first in the field in construing a state statute, which subsequently receives a different construction at the hands of the highest court of that state, is this court loath to follow the lead of the state tribunal.

Burgess v. *Seligman*, 107 U. S., 20, 33, was a case arising in the United States Circuit Court of Missouri. It was founded on certain provisions of a law of Missouri creating liability on the part of stockholders for the debts of a corporation. Judgment was entered for the defendants. Subsequently two cases involving not only the construction of the same law, but the identical transactions that had been before the Circuit Court, arose in the state courts and on appeal the Supreme Court of Missouri rendered decisions adverse to the judgment of the federal court. Later, the first mentioned case reached this court on appeal. Notwithstanding that the two adverse state decisions were confidently cited by counsel as authority on the subject, this court declined to follow them and affirmed the

Circuit Court's judgment. In a carefully considered opinion, Mr. Justice BRADLEY says, upon this subject:

"We do not consider ourselves bound to follow the decision "of the state court in this case. When the transactions in "controversy occurred, and when the case was under the con- "sideration of the Circuit Court, no construction of the statute "had been given by the state tribunals, contrary to that given "by the Circuit Court. The federal courts have an independ- "ent jurisdiction in the administration of state laws, co-ordinate "with, and not sub-ordinate to, that of the state courts, and "are bound to exercise their own judgment as to the meaning "and effect of those laws. The existence of two co-ordinate "jurisdictions in the same territory is peculiar, and the results "would be anomalous and inconvenient but for the exercise "of mutual respect and deference. Since the ordinary "administration of the law is carried on by the State "courts, it necessarily happens that by the course of their "decisions certain rules are established which become rules "of property and action in the state, and have all the effect of "law and which it would be wrong to disturb. This is "especially true in regard to the law of real estate and the "construction of state constitutions and statutes. Such estab- "lished rules are always regarded by the federal courts, no "less than by the state courts, themselves, as authoritative "declarations of what the law is. But where the law has not "been thus settled, it is the right and duty of the federal "courts to exercise their own judgment, as they always do in "reference to the doctrines of commercial law and general "jurisprudence. So when contracts and transactions have "been entered into, and rights have accrued thereon under a "particular state of the decisions, or when there has been no "decision of the state tribunals, the federal courts properly "claim the right to adopt their own interpretation of the law

"applicable to the case, although a different interpretation "may be adopted by the state courts after such rights have "accrued. But even in such cases, for the sake of harmony "and to avoid confusion, the federal court will lean toward an "agreement of views with the state courts, if the question "seems to them balanced with doubt. Acting on these prin- "ciples, founded as they are on comity and good sense, the "courts of the United States, without sacrificing their own "dignity as independent tribunals, endeavor to avoid, and in "most cases do avoid, any unseemly conflict with the well- "considered decisions of the state courts. As, however, the "very object of giving to the national courts jurisdiction to "administer the laws of the states in controversies between "citizens of different states was to institute independent trib- "unals which it might be supposed would be unaffected by "local prejudice and sectional views, it would be a dereliction "of their duty not to exercise an independent judgment in "cases not foreclosed by previous adjudication."

(*c*) Now, in the case from which the foregoing words are quoted, this court followed, in the face of a contrary state decision, the judgment of one of the United States Circuit Courts. In the case at bar, there is much more reason for expecting this court to abide by the construction adopted, not by one of the Circuit Courts, but in one of their own most deliberate and emphatic decisions.

Such a course has been already pursued by this court in the following similar cases:

From the opinion in *Rowan* v. *Runnels*, 5 How., 134, it appears that the United States Supreme Court had, in the case of *Groves* v. *Slaughter*, 15 Pet., 449, decided a certain contract to be valid under the constitution of Mississippi. Subsequently to that decision the highest court of Mississippi had held a similar contract invalid under the same constitution. When

still another contract of similar import came before this court for construction in *Rowan* v. *Runnels*, they declined to reverse their decision in *Groves* v. *Slaughter* for the purpose of conforming to the contrary decision of the state tribunal, and held the contract valid. To quote the opinion of Chief Justice TANEY (page 139), "It is argued that inasmuch as this court "adopts the construction given by the state courts to their "own constitution and laws, we ought to follow the decisions "in Mississippi and declare the contract before us to be void, "notwithstanding the case of *Groves* v. *Slaughter*.

"But we are not aware of any decision in this court which "presses the rule so far, or that would justify this court in de- "claring contracts to be void upon this ground which, upon "the fullest consideration, it has so recently held to be "good * * *.

"Acting under the opinion thus deliberately given by this "court, we can hardly be required, by any comity or respect "for the state courts, to surrender our judgment to decisions "since made in the state, and declare contracts to be void "which, upon full consideration, we have pronounced to be "valid."

The question in a comparatively recent case was the validity or invalidity of certain county bonds in Mississippi, and it involved the construction of that state's constitution and one of its legislative acts. The Supreme court of Mississippi had held that certain other bonds of the same issue were void, and the United States Supreme Court had decided the same question in construing a provision of the constitution of Missouri identical with that of Mississippi, and had held similar bonds to be valid. Disregarding the construction by the highest court of the state of its own constitution and one of its own laws, this court followed its own previously adopted construction.

Carroll County v. *Smith*, 111 U. S., 556.

In *Pease* v. *Peck*, 18 How., 595, the question was whether a certain clause, that had been omitted from an early publication of the laws of Michigan but included in subsequent ones, was properly a part of the statutes of limitation of that state. In holding that the clause must be taken as a part of that statute, the court say (page 598): "The only argument "which has been urged, which could lead us to doubt the just- "ness of this conclusion, is that the Supreme Court of Michi- "gan have, it is said, come to a different decision on this ques- "tion. We entertain the highest respect for that learned "court, and, in any question affecting the construction of their "own laws, where we entertained any doubt, would be glad to "be relieved from doubt and responsibility by reposing on "their decision. There are, it is true, many *dicta* to be "found in our own decisions averring that the courts of "the United States are bound to follow the decisions of "the state courts on the construction of their own laws. "But although this may be a correct, yet a rather strong, "expression of a general rule, it cannot be received as "the enunciation of a maxim of universal application. Ac- "cordingly, our reports furnish many cases of exceptions to it. "In all cases where there is a settled construction of the laws "of a state by its highest judicature, established by admitted "precedent, it is the practice of the courts of the United States "to receive and adopt it without criticism or further inquiry. "*But when this court have first decided a question arising un-* "*der the state laws, we do not feel bound to surrender our con-* "*victions on account of a contrary subsequent decision of a state* "*court.*"

In this connection—once more in anticipated reply to our opponents' defense in case of their intrenchment behind the Illinois case above frequently cited—we would respectfully press upon the consideration of this court the rights of appel-

lants as citizens of the United States and as citizens of states foreign to the one in which the local law enunciated in *Farwell* v. *Nilsson* obtains.

All the appellants are either aliens or citizens of the State of New York. At the time this suit was instituted the highest federal authority had solemnly announced, as the law governing the judgments of the United States courts, the salutary doctrine of *White* v. *Cotzhausen*. Encouraged thus to come, and confidently relying upon the application of this doctrine to their own case (a counterpart, substantially, of the case of *White* v. *Cotzhausen*), appellants came into the United States court, as they were entitled to do by virtue of their citizenship, and besought their equitable intervention. About a year later the Illinois Supreme Court announced as the law of the courts of that state a doctrine which, if followed in the present suit, would deny appellants remedies almost guaranteed by the federal courts to suitors similarly situated. If appellants have a right to come into the federal courts at all, they have a right to the remedies that are peculiar to those courts, without reference to whether or not they could obtain similar redress in any other court whatever.

"Parties who, by the constitution and laws of the United "States, have a right to have their controversies decided in "their tribunals, have a right to demand the unbiased judg- "ment of the court. The theory upon which jurisdiction is "conferred on the courts of the United States in controversies "between citizens of different states, has its foundation in the "supposition that, possibly, the state tribunal might not be "impartial between their own citizens and foreigners."

Pease v. *Peck*, 18 How., 599.

"Whilst it will not be denied that the laws of the several "states are of binding authority upon their domestic tribunals,

"and upon persons and property within their appropriate "jurisdiction, it is equally clear that those laws cannot affect, "either by enlargement or diminution, the jurisdiction of the "courts of the United States as vested and prescribed by the "constitution and laws of the United States, nor destroy or "control the rights of parties litigant to whom the right of "resort to these courts has been secured by the laws and con-"stitution."

Watson v. *Tarpley*, 18 How., 517, 520.

The ground on which rests the duty of the court to "exer-"cise an independent judgment" in cases of conflict between federal and state authority is, as they themselves declare in *Burgess* v. *Seligman*, 107 U. S., 20, 34, the fact that "the "very object of giving to the national courts jurisdiction to "administer the laws of the states in controversies between "citizens of different states was to institute independent tri-"bunals which it might be supposed would be unaffected by "local prejudice and sectional views."

Our understanding of the meaning of the foregoing quotation is confirmed by some words in an opinion delivered by Judge PARDEE, sitting in the Eastern District of Louisiana. After stating the general rule that the federal courts adopt the decisions of the state courts in the construction of their own statutes, and after citing several cases, the last of which is *Burgess* v. *Seligman*, he says: "In *Pease* v. *Peck* and in the "last cited case it is intimated that the general rule should "lose some of its rigidity in cases involving controversies be-"tween citizens of different states."

New Orleans Water Works Co. v. *Southern Brewing Co.*, 36 Fed. R., 833, 835.

When the decision of a state court "is presented for ap-"plication by the courts of the United States in a litigation

"growing out of the same facts, of which they have jurisdic-
"tion by reason of the citizenship of the parties, the plaintiff
"has a right, under the constitution of the United States, to
"the independent judgment of those courts, to determine for
"themselves what is the law of the state by which his rights
"are fixed and governed. It was to that very end that the
"constitution granted to citizens of one state, suing in another,
"the choice of resorting to a federal tribunal."

Carroll County v. *Smith*, 111 U. S., 556, 563.

In conclusion, we respectfully submit that appellants are entitled to the relief prayed for because none of the specific objections raised by the demurrer are tenable; because the bill shows a state of facts peculiarly offensive to a court of equity, whether its intervention be sought on general equitable principles or in reliance upon the special statute against fraudulent preferences; because the only thing that can be conceived of as militating against such intervention is adherence to a rule of comity, of not unexceptionable application, and of no binding obligation, which adherence would result in this court's following a doctrine that has already failed to commend itself to their judgment; and because the adoption of such doctrine would necessitate the abandonment of a position fair and equitable and uncompromisingly assumed, and in confident reliance upon which appellants came into the federal court in the name of he constitution and laws of the United States.

SYDNEY RICHMOND TABER,
Solicitor and of Counsel for Appellants Schnabel Brothers.

Office Supreme Court U. S.
FILED.
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CLERK.

No. 1428. No. 268.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1893.

ENGLEBERT HARDT et al.,

vs.

SIGISMUND HEIDWEYER et al.

Appeal from the Circuit Court for the Northern Dist. of Illinois.

BRIEF FOR THE APPELLEES.

REMY & MANN,
Solicitors for Appellees.

CURTIS H. REMY,
of Counsel for Appellees.

M. G. Lampkins, Legal Printer, 184 Dearborn St.

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BRIEF FOR APPELLEES.

STATEMENT.

MAY IT PLEASE THE COURT:

The appellants were the complainants below.

The Court (Judge Blodgett) sustained the demurrer of the appellees to their bill, and the appeal here is on the judgment entered on the demurrer.

The only question presented by the record is as to the sufficiency of the appellants' bill of complaint.

We respectfully submit, that the "statement of the case" made in the brief on behalf of the appellants does

not accurately state the contents of the complaint, that is to say, we think, that the statement is extended and is broader and fuller than the allegations made in their bill *justify*.

The bill of complaint is their legal statement of facts, and must control and be so considered.

We invite the Court's attention to the bill as it appears in the record.

The bill is framed on two theories.

The firm of Heidweyer & Steiglitz made certain confessions of judgments in favor of sundry of their creditors in the Superior Court of Cook county, Illinois.

The bill seeks, *first*, to have these judgments construed to be under the laws of the state of Illinois, a voluntary assignment for the benefit of creditors generally, under the Voluntary Assignment Act, or, *second*, failing in that, to have them adjudged void, as fraudulent conveyances made with intent to hinder, delay and defraud creditors.

The appellants' case is *stale* and has an *ancient* look about it.

The bill shows that the acts complained of were committed in September and October, *1884*.

The original bill in this case was filed on the *23rd day of April, 1889*, nearly five years after the cause of action, if any, accrued. The bill does not show any legal, or sufficient excuse for this delay.

The material allegations in the bill are in their essence as follows:

It is alleged, that on *September 16, 1884*, Heidweyer & Steiglitz, being insolvent, executed to sundry of their creditors judgment notes of that date, and that on *October 13, 1884*, they executed certain other judgment notes in favor of certain other creditors.

It is alleged that *on the 15th day of October*, 1884, judgments were entered on said notes in the Superior Court of Cook county, Illinois, and that executions were issued thereon, and levied on all the stock and tangible property of Heidweyer & Steiglitz and that said stock and property was sold and the proceeds thereof applied on the executions, but that said sale did not realize enough by $9,565.50 to satisfy the same.

It is also alleged that said judgment notes contained provisions for attorney's fees in the aggregate sum of $3,564.04.

But it is not averred that said attorney's fees, or any part thereof, were paid out of the proceeds arising from said sale. On the contrary, it appears, that no part of said attorney's fees were so paid, because it is alleged, that there was a deficiency on said sale of more than nine thousand five hundred dollars—a deficiency of nearly three times the amount of attorney's fees alleged to be included in the judgments.

It is not alleged in the bill, that property so taken, levied on, and sold was *all* the property owned and possessed by Heidweyer & Steiglitz at that time.

On the contrary, it appears by the bill it was not, for it is expressly alleged that they (Heidweyer & Steiglitz) had bills receivable of the value of about $18,000.00 and also accounts receivable of about the value of $6,000.00 in addition to the property levied upon.

In a vain and strained attempt to bolster their effort to make a general assignment out of the acts complained of, it is also alleged that Heidweyer & Steiglitz "*assigned and delivered*" said bills and accounts receivable to one of the said preferred judgment creditors, Mr. Simon Flor-

sheim, in trust to collect the same for the benefit of said judgment creditors.

The Court will notice a very significant and material omission in the bill as to the alleged assignment and transfer of said bills and accounts receivable.

It is not averred when or how it was done. It is alleged that it was done as "*a part of the same scheme of preference.*" But that is not the averment of a fact. It is a mere conclusion.

When were said bills and accounts receivable assigned and transferred?

The complaint is silent on this important fact. Was it done a year, or two years, or more after the judgments were entered? The presumption is against the pleader. There may have been purpose and design in concealing the time as to said alleged assignment and transfer of said bills and accounts receivable.

Further, it is not alleged how it was done, whether verbally, or by writing. *There is no averment that there was any* WRITING or instrument signed or delivered.

But after all it does expressly appear in the amended bill filed on the 15th day of *Jan'y, 1890*, nearly a year after the filing of the original bill, that this alleged assignment and transfer of accounts and bills receivable was made, if at all, *long after the judgment notes* were made and judgments entered thereon in the Superior Court. (See Transcript, page 22.)

This amended bill alleges that the appellants *immediately* after the entry of the judgments complained of made an *investigation of the facts*, and that said accounts and bills receivable were then still in the possession and were the property of Heidweyer & Steiglitz and so applicable to the payment of other debts, and that they

were told by *Heidweyer & Steiglitz* that they intended to collect them and apply the proceeds thereof to such payment, etc., etc.

ARGUMENT.

FIRST PROPOSITION.

The preferences given by Heidweyer & Steiglitz in September and October, 1884, are not void under the Voluntary Assignment Act of Illinois, and do not under said Act constitute a constructive assignment.

The courts of Illinois have *frequently* construed the Assignment Act of that state. We desire briefly to refer to a few of the most recent cases.

The recent opinion of the learned *Judge Gary* in the case of the *American Cutlery Co.* v. *Joseph et al.*, decided March 19, 1892, 44 Ill. App. R. pp. 194–195, is so pointed and brief that we desire to quote it in full. The opinion is as follows:

"GARY, J.: By petition to the County Court the appellant sought to have that Court hold that twenty-three separate judgments, entered upon as many judgment notes, given by the appellees to their several creditors, and which judgments, as the petition alleges, the appellees caused to be entered, and caused executions thereon to issue, and to be levied, constituted a voluntary assignment for the benefit of their creditors. That Court refused so to do, and now the appellant comes here and asks us to so hold.

"In *Farwell* v. *Nilsson*, 35 Ill. 164, 133 Ill. 45, the law is held the other way; and in *First National Bank* v. *North Wisconsin Lumber Co.*, 41 Ill. App. 383, all the prior cases are collected in order to show that security

and means of payment to a creditor, or to separate creditors severally, though all others are defeated, do not constitute an assignment for the benefit of creditors under the statute. I once thought such security an evasion of the statute, to be reached by bill in equity, but have been *taught better*. *Farwell* v. *Nilsson*, 35 Ill. App. 164.

"The decree dismissing the petition is affirmed."

We also call the Court's attention to the case of *Farwell* v. *Nilsson*, 35 Ill. App. R. p. 164, (cited by appellants).

The following are extracts from the opinion in the last named case. On page 171 (35 Ill. App. R.) it is said:

"Confessing a judgment in favor of one creditor will create a lien on all the property of the debtor, and to satisfy such judgment may exhaust all the assets of the debtor and leave him without any property to apply to his other debts. If he may confess judgment in favor of one creditor, why may he not do so in favor of a dozen, and if such judgments are confessed for debts *bona fide* due, how can the knowledge on the debtor's part that his entire estate will be required to discharge such judgment debts, or his intention to create a preference in favor of such creditors over others, by confessing judgments, render his act fraudulent? He has done in good faith that which the common law always permitted him to do, and what the Supreme Court has said the statute does not assume to interfere with, in the slightest degree."

And on page 172 of the same case the Court say:

"The act regulates the *conduct* of assigning, not of insolvent debtors. We have no involuntary assignment law, and we know of no principle of law operative in this state that limits or controls an insolvent debtor in the distribution of his assets provided they are applied in

discharge of *bona fide* debts. That the true meaning of this voluntary assignment act is the one here taken by us is further and clearly shown by the case of *Schroeder* v. *Walsh*, 120 Ill. 402, the opinion in which was written by the same judge who wrote in *Preston* v. *Spaulding*, (120 Ill. 208), and was filed on the same day as the opinion in said last mentioned case. There an instruction was given which stated to the jury that 'if a man finds himself in failing circumstances, he has a right to prefer one creditor to another; to so dispose of his property that one of his creditors shall receive his pay in full, and another receive nothing; nor is there any presumption of fraud in so doing.' This proposition was assigned as error, and in approving it the Court said: 'In the absence of any bankrupt law or statute to the contrary, the law is well settled that a debtor in failing circumstances, not seeking the benefit of the general assignment law, may prefer one creditor to another equally meritorious, if done in good faith. * * * * * * The statute relating to assignments by debtors for the benefit of creditors prohibiting preferences in such assignments, has no application to a case of this kind. Notwithstanding that statute a debtor may pay one creditor in full either in money or by sale of his property.' "

And on pages 173–174 of the same opinion the Court say:

"The case of *White* v. *Cotzhausen*, 129 U. S. 329, is pressed upon our attention by counsel for appellants as being a decision of the Supreme Court of the United States which fully sustains the construction of the law for which he contends. It must be admitted that the case cited does support appellant's view, and we shall not attempt to distinguish said case from the one here pre-

sented. Much as we respect the conclusions of that learned Court, we are, upon questions involving the construction of statutes of our own state, bound by the decisions of our Supreme Court. If our Court had not, as we conceive it has, *already made its construction* of the voluntary assignment act plain, we should nevertheless find great difficulty, as will appear from what we have already said in assenting to the view taken in *White* v. *Cotzhausen*."

We also call the Court's attention to the very recent case of *Ross et al.* v. *James H. Walker & Co. et al.*, decided Nov. 27, 1893, by the Appellate Court of Illinois and just reported in full in the *Chicago Legal News* of *Dec. 23, 1893*. The Court will find this a well considered and reasoned case, in which the Illinois decisions are reviewed and discussed.

Judge Magruder in giving the opinion of the Supreme Court of Illinois in the late case of *Young et al.* v. *Clapp et al.* (32 Northeastern Reporter, pp. 187–189) said:

MAGRUDER, J.: "The thirteenth section of the assignment act (Rev. St. 1891, c. 10*a*.) does not prohibit preferences generally, but only preferences which are contained in written deeds of assignment voluntarily executed for the benefit of creditors. The language of the section is that 'every provision in any assignment hereafter made in this state for the payment of one debt or liability in preference to another shall be void.' A preference, given by a debtor after he has made up his mind to execute a general assignment for the benefit of his creditors, has been held to be void upon the theory that such a preference must be regarded as a part of the assignment. *There is no such thing as a constructive assignment contemplated by the assignment act.* That act does not

take away the common law right of a debtor to prefer one or more of his creditors. A preference may be given by the execution of a judgment note resulting in the entry thereon of a judgment.". A rehearing was granted in this case and on October 26, 1893, this Court again said "we have carefully reconsidered the case and come to the same conclusion as announced." See Adv. Sheets, 147 Ills., p. 176.

See also—

Nat'l Bank v. *N. W. L. Co.*, 41 App. Ill. 383.
Schroeder v. *Walsh*, 120 Ill. 403.
Weber v. *Mick*, 131 Ill. 533.
Woonsocket Rubber Co. v. *Farley et al.*, 30 Fed. R., p. 808, and notes.
Weil et al. v. *Polack et al.*, 30 Fed. R. 813.
Coffin et al. v. *Day et al.*, 34 Fed. R. 687.
Farwell v. *Nilsson*, 133 Ill. 45.

It is clear, we submit, beyond debate, that under the decisions of the courts of Illinois construing the Illinois assignment act, that the acts complained of in the bill in this case do not constitute either an actual or constructive assignment under that act.

Nor was a trust of any character created.

SECOND PROPOSITION.

Upon the proper construction of the Voluntary Assignment Act of Illinois, the United States Courts will follow the decisions of the Supreme Court of Illinois as authoritative declarations of what the law is.

The Supreme Court of Illinois, as we have seen, has spoken plainly and often in the premises. It has repeatedly construed the Illinois Assignment Act, and

with no uncertain voice has proclaimed and declared what the law is.

This Court will take pleasure in recognizing the law so pronounced.

The appellants' counsel rest their case almost wholly on the case of *White* v. *Cotzhausen*, 129 U. S. 329, quite to be distinguished from this case, for there instruments of conveyance were actually made, and in this case there is no contention that any deed, mortgage or instrument of conveyance was in fact executed of *any kind*.

Besides, this case, as appears by the citations hereinbefore made, is entirely out of harmony with the decisions of the Supreme Court of Illinois. It cannot be reconciled with them. It has been expressly so decided and denied by the courts of Illinois.

35 Ill. App. Ct., pp. 173–174.
Affirmed 133 Ill. 45.

The question of the right construction of the Illinois Assignment Act is not a question of general commercial law or general jurisprudence.

The case of *Burgess* v. *Seligman*, 107 U. S. 20, cited in appellants' brief, has no analogy or application to the case at bar. It is dissimilar to, and unlike the case here.

In the case of *Randolph* v. *Quidnick Co.*, 135 U. S. 457–463, this Court says:

"As to the construction of a state statute, we generally follow the rulings of the highest court of the state, *Bacon* v. *Northwestern Life Insurance Co.*, 131 U. S. 258, and cases cited in opinion; and as to other matters, we lean towards an agreement of views with the state courts. *Burgess* v. *Seligman*, 107 U. S. 20, 34. So, when the

highest Court of a state affirms that a conveyance, made by a debtor to a trustee for the benefit of creditors, is valid under the statutes of *that state*, we should ordinarily, in any case involving the validity of such conveyance, follow that ruling, even though that statute was common to many states, and in others a different ruling had obtained."

In the recent case of the *Union Bank of Chicago* v. *Kansas City Bank*, (136 U. S., pp. 223-235), this Court said:

"The question of the construction and effect of a statute of a state, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest Court of the state, establishing a rule of property, are of controlling authority in the courts of the United States."

We need not multiply authorities upon this proposition.

THIRD PROPOSITION.

The acts or preferences complained of do not constitute a fraudulent conveyance with intent to delay, hinder and defraud other creditors.

The acts complained of are not fraudulent. They are mere preferences. They involve no secret or covert trust for the benefit of the debtors.

The judgments were confessed in open Court. They were at all times a matter of open, public record, and their validity cannot be now questioned. The appellants in their bill allege that they knew about them upon their entry and immediately made an investigation thereof.

There was no concealment about it.

As to the assignment of the accounts and bills re-

ceivable, the allegation that the surplus, if any, was to go to the debtors, is no evidence of a fraudulent *intent.*

In law, that is where the surplus *should* go. There is no averment that there was any surplus. See—

Jones on Chattel Mortg's, Sec. 352 and note.

All preferences in a sense delay or hinder other creditors, but they are not for that reason fraudulent.

A debtor has a right to prefer certain creditors even to the entire exclusion of others, and such preferences are not fraudulent.

Stewart et al. v. *Dunham et al.*, 115 U. S. 61–67.

Micon v. *National Bank*, 104 U. S. 530.

Smith v. *Craft*, 123 U. S. 436.

Jewell v. *Knight*, 123 U. S. 426.

The acts complained were mere preferences to *bona fide* creditors, which the debtors had a right to make, and in no sense, legal or equitable, are they fraudulent.

FOURTH PROPOSITION.

The laches of the appellants in bringing this suit bars and precludes them from obtaining any relief in equity.

The acts complained of in the bill of complaint are alleged to have been committed in the months of *September* and *October, 1884.*

The original bill was filed in this case *on the 23d of September, 1889*, and the amended bill was filed on the *15th day of January*, 1890. That is to say, the original bill was filed nearly five years after the right of action, if any, accrued, and the amended bill was filed more than five years thereafter. It would be manifest injustice to

now disturb the relations of parties, for it is reasonable to infer that all this money has been paid out, and the rights of others have intervened.

It is a well-settled rule that if the *laches* of the plaintiff, and the *staleness* of his claim are apparent from his bill of complaint, objection may be taken by way of demurrer.

A party who seeks to set aside alleged fraudulent conveyances, or to avoid and annul judgments, must institute proceedings within a reasonable time, otherwise his right of action will be lost. He can not sleep upon his rights. He must be vigilant. He must act promptly.

In the case of *Speidel et al.* v. *Henrici*, (120 U. S. 377–390), this Court said:

"In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law."

In *Lansdale* v. *Smith*, (106 U. S. pp. 391–395), it is held that courts of equity deny relief to those who delay for an unreasonable time in asserting their claims, and that if such *laches* appears on the face of the bill of complaint, the defendant may reach it by demurrer. See—

National Bank v. *Carpenter*, 101 U. S. p. 567.
Godden v. *Kimmel*, 99 U. S. 201.
Badger v. *Badger*, 2 Wall. 87.
Crosby v. *Beale*, 17 Wall. 336.
McKnight v. *Taylor*, 1 How. 161.

Courts of equity often treat a lapse of time *less* than that prescribed by the Statute of Limitations as a presumptive bar.

Hayward v. *Eliot Nat. Bank*, 96 U. S. 611.

Equity always refuses to interfere where there has been gross *laches* in the prosecution of alleged rights.

There is no *artificial rule* on such a subject, *but each case, as it arises, must be determined by its own particular circumstances.*

McQuiddy v. *Ware*, 20 Wall. (U. S.) 14-20.

A court of equity applies the rule of *laches* according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances.

Brown v. *County of Buena Vista*, 95 U. S. 157.

In the case of *Sullivan* v. *R. R. Co.*, (94 U. S. 806-812), this Court said:

"To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the *laches* of the complainants, the Court will, upon that ground, be passive and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar."

The appellants' case is "stale." They have slept on their pretended rights. Their *laches* is without cause or excuse. The acts they complain of were done in *1884*. They were not done in secret or under cover. They were done in day-light. They were done in open Court. The appellants knew of the preferences made by the

debtors by confession of judgments at the time they were confessed in 1884, or immediately thereafter, for they say in their amended bill (Transcript, p. 22,) that immediately after the entry of the judgments complained of they caused an investigation to be made in the premises. So they had actual notice. They then slept for nearly five years before they filed their original bill, and they slept for *more than five* years before they filed their amended bill. In fact they had acquiesced in the acts now complained of, and rested content and uncomplaining until wary and cunning attorneys read the case of *White* v. *Colzhausen*, (129 U. S. 329), *decided January 28, 1889*. Then, and not until then, did they feel *aggrieved*. Then for the first time their voices were heard in complaint.

Equity does not favor such tardy soldiers, nor aid in the relief of parties who have shown no diligence. The case looks like a purely speculative one. It is a resurrection; it has been dead and at rest and mouldering for five years.

The appellants are now too late, their *laches* is too gross, and equity will not interfere in their behalf. Besides, as the Court will see from the facts set forth in complainant's bill, it is not a case parallel with *White* v. *Colzhausen*.

And *that* case, as we have seen, is not the law as declared by the Supreme Court of Illinois, and this Court has repeatedly said it will follow and abide by the law of the state as so declared by its Supreme Court in cases like the one at bar.

136 U. S. p. 235.

FIFTH PROPOSITION.

The provision in the judgment notes for attorney's fees was neither fraudulent nor a badge of fraud.

Mills v. *Pessels*, 55 Fed. R. 588.

It must be remembered that these notes were made in 1884. And it is a matter of common knowledge in the profession, of which this Court will take judicial notice, that it was then the common and usual practice to take such notes. The provision for attorney's fees was in the printed forms of blank notes then and since used. There was nothing secret about it. It appeared upon the face of the notes, and in the judgments entered thereon. And the appellants knew of these facts in 1884. It is almost ridiculous to assert that such a provision is fraudulent. Besides, it appears by the bill that these attorney fees were not collected out of the proceeds of the execution sale on the judgments. The amount realized on the judgments by execution was more than $9,500.00 *less* than the amount of the judgments, which is nearly three times the amount of the attorney's fees alleged to have been included in the notes.

It is fair to state that the bill does allege that these attorney fees were afterwards paid out of the alleged assigned and transferred accounts and bills receivable. But this is an immaterial matter. It is a novel proposition to assert that such a provision in judgment notes given by an insolvent debtor would anyhow render the notes or the judgments entered on them fraudulent and void.

SIXTH PROPOSITION.

It appears upon the face of the bill that Herman Hahlo and the firm of Hahlo, Steiglitz & Co. are necessary parties to this suit, and that they have not been made parties.

It appears by the bill that said named parties *Herman Hahlo* and the firm of *Hahlo, Steiglitz & Co.* were also preferred as creditors in precisely the same way and at the same time, and as a part of the same transaction as the appellees, and that their judgments were paid out of the proceeds realized on the assigned and transferred bills and accounts receivable.

It is said in the appellants' brief (p. 37) that said parties so omitted from the bill of complaint were and are citizens of the state of New York, of which said state the appellants were also citizens.

So it seems they were purposely omitted from the bill as defendants because, if they had been made parties defendant as they should have been, the jurisdiction of the Court would have been ousted.

It is evident on the face of the bill that they were *necessary* parties.

The bill is framed on the theory that the acts complained of created an equitable trust, and that all of the preferred creditors, including the said omitted parties, were trustees for the benefit of all the general creditors.

The omitted parties under the averments of the bill were liable, if there was any liability, to *contribution.* Their interests were directly involved and identical with appellees, and they were indispensable parties.

McArthur v. *Scott*, 113 U. S. 340.

Fourth Nat. B'k v. *R. R. Co.*, 11 Wall. (U. S.) 624.
Mandeville v. *Riggs*, 2 Pet. 482.
Barney v. *Baltimore*, 6 Wall. (U. S.) 280.
Ribon v. *R. R. Co.*, 16 Wall. (U. S.) 446.

CONCLUSION.

We respectfully submit that the judgment below should be affirmed, and that the appellants have made no case by their bill entitling them to any relief in a court of equity.

REMY & MANN,
Solicitors for Appellees.

CURTIS H. REMY,
of Counsel.

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vs.

SIGISMUND HEIDWEYER ET AL.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois

Reply Brief and Argument on Behalf of Appellants.

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Reply Brief and Argument on Behalf of Appellants.

The brief on behalf of appellees is noteworthy for its evasion of the two principal points involved in this case, to which we again desire to call the attention of the Court.

I.

Did the assignment and delivery by Heidweyer & Stieglitz to Simon Florsheim of $24,000 of their bills and accounts receivable, *in trust* to collect them for the *pro rata* benefit of the several judgment creditors, and the con-

fession of judgment in favor of Sigismund Florsheim, for $27,000 *in trust* for the benefit of certain creditors of the debtors on whose notes, not due, he was endorser—or did either of these transactions—constitute a "voluntary assignment for the benefit of *creditor* or *creditors*" as contemplated by the Illinois assignment law, as the same has been construed by the Supreme Court of that State?

Counsel for appellees assert that it nowhere appears in the bill *when* the bills and accounts were assigned. They are mistaken. It is in the amended bill alleged not only that they were so assigned "as a part of the same scheme of preference," but in another part of the bill (record page 23), it is further alleged that "within less than one month from the time of bringing this suit the complainants for the first time learned not only that said judgments took all the tangible property of Heidweyer & Stieglitz, but that the entry thereof was procured by them for the express purpose of preferring the judgment creditors, and that *at the same time* they transferred all their remaining property to a trustee for the benefit of creditors, as heretofore in this bill alleged."

We concede that it is thoroughly settled by the Supreme Court of Illinois that the giving of preferences by an insolvent debtor by confession of judgment merely, does not constitute a voluntary assignment, although all the debtor's property is thus disposed of. It is just as well settled, however, that where such confessions are part of a general scheme to dispose of all or part of his property, any part of which scheme consists of the creation of a *trust for the benefit of creditor or creditors*, the whole comes within the purview of the assignment law, and will be construed together as constituting an assignment for the benefit of creditors. The authorities in this State so holding are made plain in our principal brief.

The allegation as to time is thus seen to be certain, being, in substance, that the debtors, at the time that they

confessed the judgments, "assigned and delivered" to a trustee $24,000 of bills and accounts receivable to be collected for the benefit of the same creditors.

It is objected further that we do not show *how* this was done. It seems to us that the words "assigned and delivered" are quite comprehensive, and that the allegation would have been no stronger, for the purposes of a pleading, if it had been added that the assignment was in writing, and set out in full. Certainty to a common intent is all that is requisite in an equity pleading.

The form or substance of a voluntary assignment is in no way prescribed by the Illinois statute. Anything is an assignment now which would have been so treated before its enactment. This is held in the numerous cases already cited in our brief. The act merely controls the administration and avoids preferences.

That an assignment may be created by parol in Illinois, has been held in several cases.

In *Dole* v. *Olmstead*, 36 Ill. 156, a parol assignment was enforced, and the court said:

"It appears that the assignment of complainants was verbal * * *. When they went into possession as trustees, it was for the benefit of all parties in interest * * * and as such, became liable to perform all the duties imposed by that relation."

In *Cooper* v. *McClun* 16 Ill. 435, the court enforced a parol assignment. The property was a note delivered to the transferee, who was to collect and pay it to creditors. The court held it a valid assignment, although *there was not a scratch of a pen by the assignor.*

The same was held in *Lill* v. *Brant*, 6 Brad. (Ill. Appellate) 366.

In *Tyler* v. *Tyler*, 126 Ill. 539, the court says:

"We do not think the question of the secrecy or the publicity of the trust is effected by the circumstance of whether it was created by word of mouth or by writing; that affects simply the question of proof. * * * But manifestly a trust may be public and yet be created by word of mouth."

A voluntary assignment for creditors is merely the creation of a trust. It may as well be created by parol as by writing. The authorities to this effect in other States are numerous.

Day v. *Roth*, 18 N. Y. 448.
Hunnewell v. *Lane*, 11 Met. 163.
Gerrise v. *New Bedford*, 128 Mass. 159.
Davis v. *Coburn*, 128 Mass. 377.
Chase v. *Chapin*, 130 Mass. 128.
Boyden v. *Moore*, 11 Pick. 362.
Loftin v. *Lyon*, 22 Ala. 540.
Domestic v. *Anderson*, 23 Minn. 55.
Lockwood v. *Canfield*, 20 Cal. 126.
See also Perry on Trusts, Sec 87, and note.

So we submit, that the allegation of the bill that the $24,000 of notes and accounts were "assigned and delivered" to a trustee, is entirely ample as a statement in a pleading of the transaction referred to, whether it was by parol or by writing, and that it shows beyond dispute a voluntary assignment of those bills and accounts for the benefit of creditors, under the Illinois law. In like manner the confession of judgment to Sigismund Florsheim for $27,000, for his indemnity as endorser on notes of the insolvents, held by sundry other creditors, was the creation of a trust in him for the benefit of those creditors, and is, therefore, under the authorities cited in our brief, as much an assignment to a trustee for their benefit, as if prop-

erty had been directly transferred instead to him, for a like purpose. He is clearly chargeable in equity for the proceeds of that judgment.

It thus clearly appearing that two of the contemporaneous transactions of these insolvents were the creation of trusts for the benefit of creditors, the preferential judgments should be imported into those trusts, and the estate administered for the common benefit of creditors. The Illinois authorities in support of this proposition, were fully cited in our former brief and seem to us conclusive.

It is true that the Supreme Court of Illinois in *Young* v. *Clapp*, 32 N. E. 187, has said that "there is no such thing as a constructive assignment contemplated by the assignment act." In that case judgment was confessed by the insolvents, execution issued and returned, a creditor's bill filled, a receiver appointed, and an assignment made to the receiver, under order of the Chancery Court. It was contended that all these proceedings, having been voluntary and not aggressive, the assignment to the receiver should be administered as a voluntary assignment for the benefit of all creditors. The Supreme Court held otherwise, and made use of the language quoted, and other of the same purport. There was no question of constructive assignment in that case. The one involved was in writing. The court held that it did not come under the act, because it was the result of a legal proceeding. It cannot properly be considered as overruling or in conflict with the long line of decisions of the same court, sustaining parol assignments, and declaring certain transactions to constitute assignments which were not so intended by the parties. Nor can it be considered as disturbing the decision in the case of *Farwell* v. *Cohen* 130 Ill. 216, to which we have previously called the attention of the court. In that case the instrument involved was in form and intention a chattel mortgage by the

insolvent, on part only of his property, to one creditor for the benefit of himself and several others named. The court held it to be an assignment, within the purview of the act, and that it must be administered for the benefit of all creditors, and such is the indisputable law of Illinois at this day. The intention of the parties and the form of their transaction is thus not important. The only true criterion fixed by the court is "was there a trust created in a third person for the benefit of creditors?" "If so, there is a statutory assignment, otherwise not. That there is such a trust, in this case, cannot be denied. The brief of appellees counsel indeed makes but a futile pretense of denying it.

There seems a singular reluctance in some of the courts to enforce the spirit of legislation which impairs that favorite principle of the common law, the *jus disponendi*. While under this principle preferences to creditors by insolvents were at common law permitted, they were never favored in equity. At length in most of the States laws have been enacted prohibiting such preferences. The ingenious debtor and his lawyer immediately set about evading such statutes by making direct transfers of his property to his creditors, oftentimes the whole of it. The legislatures have by those statutes very properly antagonized the *jus disponendi* of the insolvent. The courts, while stoutly averring that preferences by an insolvent are inequitable, would naturally have welcomed these enactments as consonant with the modern sense of justice, but, instead of this, many of them have held that the insolvent may still prefer his creditors just as well as before, if he use any form for so doing, other than that of a technical general assignment. The statutes are thus emasculated and remain for practical purposes a dead letter. For fear of judicially legislating to enforce the true purposes of the statutes, they have judicially repealed them.

It is asserted by the opposing counsel that our main reliance here is the case of *White* v. *Cotzhausen*. This is by no means so. It must be conceded, however, that the unanswerable logic of the opinion in that case completely supports our contention. It was strictly in accord also with the current of Illinois decisions then announced. That case held that where preferences in assignments are prohibited by statute, and an insolvent debtor for the purpose of evading the statute, made preferential transfers of all his property direct to certain of his creditors, having the substantial effect of a preferential assignment, the entire transaction should be treated in equity as an assignment. That decision was the proper outgrowth of the boasted doctrine that equity always looks through the form of transactions to their substance, and will treat transactions constituting clear evasions of the law, as still coming within its remedial force and purpose. The courts of this country have taken a singularly kaleidoscopic view of this question. None more so than the courts of Illinois, where *dicta* at least can be found on both sides of it. It is true that the Supreme Court of this State has refused to conform to the clear reasoning in that case, where *absolute transfers or securities* are involved. So we do not regard it as conclusive, unless this court adheres to its opinion there expressed, which it may well do under the doctrine of *Burgess* v. *Seligman*, that when a federal court has first settled the construction of a State statute, it will adhere to it though subsequently antagonized by the highest court of the State. If this court is satisfied that the transfers and dispositions of property by Heidweyer & Stieglitz, involved in this case, constituted in equity an assignment for the benefit of creditors, or that they constituted transfers in fraud of creditors, we do not see that any settled Illinois "rule of property"

would be disturbed by so holding. Indeed, where a trust expressed or constructive is shown, the "rule of property" is that it never expires until it has been in good faith executed.

Be it remembered, however, that in *White* v. *Cotzhausen*, there was no trust for creditors created in any of the transactions involved. All were straight transfers or securities. While in the case at bar, a trust for creditors —one or more—is clearly set forth in complainant's bill, and stands admitted. Where such is the fact, the view taken by the Supreme Court of Illinois is in accord with those in *White* v. *Cotzhausen*, declares an assignment for creditors, and imports into it all contemporaneous transactions having the common design. To this extent only that case is clearly decisive of this.

II.

Did the including of $3,564 attorneys' fees in the judgment notes and in the judgments entered thereon, render fraudulent those judgments as to the other creditors of Heidweyer and Stieglitz?

The solution of this question involves a very simple and familiar principle of the law of fraudulent conveyances. A gift by an insolvent debtor is a fraud on his creditors. "If the intention be to hinder and delay creditors, it will vitiate the whole instrument, though it be made upon a good consideration."

"Every gift, grant, conveyance, assignment, transfer, or *charge upon* any estate real or personal * * * made with the intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other *evidence of debt* given, suit commenced, decree or *judgment suffered*, with like intent shall be void as against such creditors, purchasers and other persons." (R. S. Ill. Chap. 59, Sec. 4.)

Did Heidweyer & Stieglitz, when they gave the judgment notes to the several preferred creditors, intend to give them, and did those creditors intend to receive, unlawfully, $3,564 in excess of the amounts actually due those creditors? If they did, the *evidences of debt* thus given and the *judgments suffered* upon them were absolutely void under the statute quoted. We see no escape from this. It was not a *constructive* but an *actual* fraud.

Counsel for appellees, upon this point, make the unwarranted assertion that it was usual at the time the judgment notes in question were given, to include attorney's fees in them, and that this court will take judicial notice of the fact, expecting apparently, that the court will declare *judicially innocent* that which has been *habitually fraudulent*. We do not fear such a decision. And besides, they say, it does not appear that these attorney's fees were collected on the execution, but were collected from the trustee of the assigned accounts. In other words, that there is no distinct allegation in the bill that the attorney's fees were the first moneys collected on the executions, and thus appropriated, but that they surely were collected out of another concurrent transaction, and therefore it is to be inferred that the failure to collect these fees in the manner originally designed, renders the transaction innocent, which would otherwise have been fraudulent. The bill does show however, in regard to the judgment of the National Bank of Illinois, that the attorney's fees were collected on execution.

We have shown in our brief that courts do not indulge in any such refinement of nonsense as that to which the appellee thus invites them.

"The statute of frauds refers to a legal and not to a moral intent, for one man's right does not depend upon another man's moral sense. The statute supposes that every one is capable of perceiving what is wrong, and if he does

what is forbidden, *intending to do it*, he is not allowed to say that he did not intend to do a forbidden act. A man's moral perception may be so far perverted as to imagine an act to be fair and honest, which the law justly pronounces fraudulent and corrupt, but he is not therefore to escape from the consequences of it. The law must have a more certain standard for measuring men's intents, than each individual's varying and capricious notions of right and wrong. Whatever a man's opinion of his own acts may be, there are certain rules founded in experience and established by law, for determining the validity of transfers under the statute, and if these rules are transgressed, they are void, without regard to the opinions of the parties to it. Fraud, therefore, does not necessarily impute a corrupt or dishonorable motive." (Bump on Fraudulent Conveyences, p. 225.)

The only citation of authority by appellees to support the idea that these attorney's fees are not fraudulent, and that they do not contaminate the notes and judgments absolutely, is *Mills* v. *Vessels*, 55 Fed. Rep. 588. That was a case where, in an assignment for the benefit of creditors, the fees of the debtor's attorney for consultation and preparation of the assignment were scheduled as a debt to be paid thereunder along with others. The Court of Appeals very properly decided that a debt due from an insolvent to his lawyer is just as legitimate as any other. That is all there is to that case. It is not at all applicable to the one at bar. Here there was a voluntary gift to the creditors themselves of $3,564 outright.

In *Hulse* v. *Mershon*, 125 Ill. 52, the Supreme Court of Illinois explicitly held that the including of attorneys fees in a judgment note given by an *insolvent* debtor, is a fraud on his creditors, as amounting to a voluntary gift. The court was prevented by a stipulation of the parties from considering its effect on the judgment, beyond the attorney's fees involved. This case and numerous others

sustaining our positions, are cited fully upon our former brief. We know of none which hold otherwise.

Counsel contended that because the money realized on the executions was not sufficient to pay the attorney's fees and the whole amount of the judgment also, therefore the fact that the debtors intended to donate to the creditors $3,564, and that the creditors intended to receive it, is of no importance. This is as much as to say, that if an insolvent who owes a creditor $1,000, give his note for $2,000, and secure it by mortgage, it being the intent of both parties that $2,000 shall be collected, this would be a fraudulent conveyance. But if upon foreclosure only $1,000 be realized, the original fraudulent conveyance becomes thereby valid. In other words, that however fraudulent a transaction may be in fact, it becomes entirely innocent if it does not prove successful. A truly ridiculous position.

The judgment notes and the judgments thereon involved in this case must be construed wholly by the intent of the parties as clearly shown *at the time of the transaction.* Did the insolvent debtors intent to give the creditors all that was due them and $3,564 more to pay their lawyer? If they so intended, it is wholly immaterial whether the creditors ever got the whole or any part of it. If fraudulent at its inception, the transaction remains fraudulent. Innocence cannot be injected into it. "A stream cannot rise higher than its source."

If there is any force in well-settled principles of law—principles which have their support also in honesty and good sense—then where there is brought before a court of equity for construction an instrument, executed by an insolvent, which contemplates a voluntary gift *on its face*, and which the court sees was to be, and actually was, immediately set in motion to effectuate that fraud, we do not see what the court is to do but to declare the fraud

and decree accordingly. The parties should be left in the fraudulent predicament in which they have placed themselves. If creditors seek preferences, which they may lawfully do, surely they may not seek more than is lawfully due them, nor couple the valid with the fraudulent. If they do, the effect is inevitably to vitiate the whole. If an insolvent owes $100 to a creditor, and deliberately gives his judgment note for $200, intending that the creditor should collect that amount, unquestionable fraud is apparent—not *constructive*, but *actual*. It could not be more so, if the whole note was fictitious. If caught in this scheme by a defrauded creditor, should a court of conscience still befriend the rascal and say he must have his hundred dollars? Such is not the law as we read it.

These judgment notes are not only fraudulent on their face as instruments devised by an insolvent to give away his property, but are also proven fraudulent by the actual use which the parties made of them. Their construction must depend upon the intent with which they were given, and not by what success the parties had in executing that intent. Larceny is no less larceny if the thief drops the stolen goods in the front yard.

We are confident the Court must see it to be its duty under the law here discussed, and as amply cited in our brief, to hold all the judgments fraudulent as to the creditors of Heidweyer & Stieglitz for the reasons here stated.

III.

As to the contention of the appellees that this case is barred by *laches*, it seems to us little better than ridiculous. They say, "It would be manifest injustice to now disturb the relation of parties, for it is reasonable to infer that all this money has been paid out and the rights of others have intervened." How lame and impotent is this pretense to invoke the equitable doctrine of *laches*. "True there was

an assignment, true there was a fraudulent conveyance to us, but we have spent the money, and should not be held to account for it, because you did not earlier get up the courage to sue us." If this is good law, it will afford protection to a vast number of rogues, to whom property is fraudulently but skillfully transferred, and who succeed in getting rid of the proceeds before the creditor becomes acquainted with the bottom facts of the transaction. It does not however, appear, nor is there any presumption, either that the defendants have spent the money or that the rights of any innocent parties have intervened.

The reasons for the delay in commencing this suit are fully set forth in the amended bill, to which the attention of the court is specially invited. They seem to us ample to account for it. It will be observed among other allegations of the bill that "the complainants *within one month* from the time of bringing this suit, for the first time learned that the debtors had transferred all their property other than that levied upon by the executions, to a trustee for the benefit of creditors, and that before that time the debtors had stated that they still had on hand their book accounts and bills receivable applicable to the payment of their unpreferred debts." Relying upon this statement, as they had a right to do, the creditors hesitated for a time, in the hope that they might realize something without suit, and though they seasonably sued their claims and put them in judgment, did not proceed in equity until the facts as to the trusteeship came to their knowledge, when, for the first time, it appeared that the complainants had a good case for equitable recovery. We do not understand that in such a case, parties aggrieved are required by any rule of equity to proceed with great dispatch to assert their rights by litigation, or that the defendants may properly claim that a delay of less than five years concludes the rights of the defrauded parties. The case was commenced

as soon as facts were ascertained which promised a recovery. It would be wholly inequitable to hold that *the complainants should have taken a leap in the dark*. If the defendants are liable, presumptively they have the money or its proceeds, and should be held accountable for it.

It comes with bad grace from defendants to claim that the creditors who were alleged to have been defrauded by them, have too long slept on their rights. It appears that they were rather obliged to sleep on their wrongs. It is not the nature of creditors to refrain from an assertion of their rights, when possessing full or even fair knowledge of the facts, or the law concerning them. The court must therefore see that they moved as soon as prudent men could be expected to. If any presumption should be indulged in at all, this is the only natural one, and, besides, this state of facts is fully alleged in the bill.

To hold that the complainants are barred by *laches* because the defendants have spent the money, or because there has been a possible change in the interests of parties, would be about as absurd as if the courts of this country, whose dockets are many years in arrear, should refuse to grant relief, because, as usually happens, some of the parties litigant have failed, or died, or sold out, or otherwise changed their position while waiting upon the law's delay. As we understand the doctrine of *laches*, it requires very strong circumstances, amounting to an estoppel by silence, to authorize its application to a case like this, where the analogous limitation of the statute has not been exceeded.

We here re-state briefly the points which we have endeavored to make plain:

1. The assignment of notes and accounts to Simon Florsheim in trust for creditors, considered by itself, comes clearly within the provisions of the Illinois assignment act. *Farwell* v. *Cohen*, *supra*, being directly in point.

2. Likewise does the judgment confessed to Sigismund Florsheim, who took it in trust for the holders of notes on which he was endorser not then due.

3. If either one of these transfers established a trust for creditors, all the others including the judgments, must be imported into it, and the whole be construed together as an assignment for the benefit of creditors.

4. In any event, the bill states a perfect cause of action as to the voluntary gift of attorney's fees embraced in the notes and judgments. Those were certainly fraudulent under *Hulse* v. *Meshon*, *supra*.

5. If this be so, an actual fraud was intended, which vitiated and rendered the notes and judgments wholly fraudulent as to creditors.

We submit with entire confidence that the complainant's bill shows a good cause of action, and that the decree of the court below should be reversed.

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